

THE DIVISION COURTS ACT

AND

AMENDMENTS THERETO.



THE DIVISION COURTS ACT

AND AMENDMENTS THERETO. 86

COMPRISING R.S.O. (1887), CAP. 51; 51 VICT., CAP. 10; 52 VICT., CAP. 12; AND 55 VICT., CAP. 11 : TOGETHER WITH

THE GENERAL RULES AND FORMS (1893).

FULLY ANNOTATED, WITH ADDITIONAL FORMS OF PROCEEDINGS APPLICABLE TO DIVISION COURTS.

FOUNDED ON AND BEING A COMPLETE CONSOLIDATION OF THE WORKS OF THE LATE J. S. SINCLAIR, ESQ., Q.C., ON DIVISION COURT LAW.

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VOLUME I.

CONTAINING THE STATUTES AND NOTES THEREON, AND A NOTE ON CLAIMS B AND AGAINST MARRIED WOMEN.

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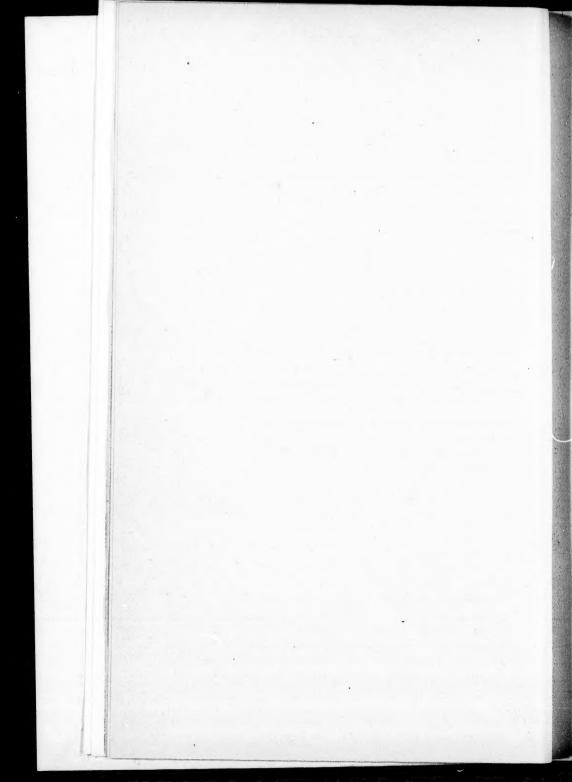
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PREFACE.

CINCE the year 1879 no complete annotation of THE DIVISION COURTS ACT has been published. In the meantime many important amendments have been introduced, and prior to the consolidation of the Act in 1887 no fewer than four works had been published by His Honor the late Judge Sinclair, dealing with these amendments, in each of which frequent references were made to his original work of 1879. After the consolidation of the statutes, another edition was issued containing the Consolidated Act with annotations, but as these latter consisted largely of references to the notes contained in the various works previously published by him, their value was greatly lessened in the cases of those practitioners who did not possess an entire set of his works, some of which were out of print and, therefore, unobtainable. In his lifetime the late Judge Sinclair had contemplated a complete consolidation and revision of all his works on Division Court law. At his death the present editors, who had assisted him during his lifetime, undertook the work. It was then expected that the new rules of practice, which had been in contemplation for some years, would be published during the summer of 1892, and the publication of the present work was delayed in the hope that these expectations would be realized. In the meantime frequent enquiries were made for the work, and complaints were made of the delay in issuing it, It was thereupon determined to issue the work containing the rules then in force and a complete collection of forms. When the printing of the Act and the annotations was completed and a large number of the rules were in type, the editors learned that the work of completing new rules was about to be actively prosecuted by the Board of County Judges, and it was then determined to publish the Act and annotations thereon as a first volume, and to issue the new rules with the forms as a second volume. The two volumes will be so arranged that they will form one complete work, but each volume will also be complete in itself. It is expected that the second volume will be published in a few months.

While the present work has for its foundation the several works of the late Judge Sinclair, and contains, it is believed, all that was of value in those works, the notes have in many instances been entirely recast and rewritten; so that although the results of fourteen years of legislative activity and judicial exposition are to be found in the following pages, the bulk of the original work has been but slightly increased, and, as compared with the bulk of all the works, a saving of several hundreds of pages has been effected.

A note has been appended on the subject of claims by and against married women, which, in view of the fact that the Ontario legislation has been at various periods in advance of and different from that of the Imperial Parliament, will, it is hoped, be found of service in assisting the solution of many difficult questions occurring almost daily. Special care has been paid to the table of contents and the index, which are the work of Mr. Seager, and to the list of abbreviations and the table of cases, which were compiled by W. D. Card, Esq., barrister, of Galt, Ont. The editors desire to express their thanks to His Honor Judge Hughes, of St. Thomas, and to J. Dickey, Esq., Inspector of Division Courts, for valuable suggestions.

Hamilton: May 15th, 1893.

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TABLE OF CONTENTS OF VOL. I.

SHORT TITLE	PAGE.
	-
Interpretation	1
Constitution of Courts	2, 3
Process	3
Not Courts of Record	3
Effect of Judgment	3
Time and Place of Holding Courts	5
Toronto courts	6
Holding courts in cities	6
Accommodation	7
Use of court house	9
Lieutenant-Governor to regulate	9
Alteration of divisions and establishment of new divisions	,
Establishment by Judge in townships Establishment on separation of united counties	11 12-16
Judges	17
Powers and liability of	
Appointment of deputy	19
Adjournment of court when Judge does not arrive in time	21
CLERKS AND BAILIFFS, ETC	21
Executive officers	22
Appointment of	22
Practising as a solicitor	22
Removal or suspension	23
Leave of absence and appointment of deputy	24, 25
Security by	26
Act Respecting Public Officers	
Scope of the covenant and liability of officers and sureties	27-30
Approval of covenant	31
Covenant to be filed	31
And to be available to suitors	32
Proof of covenant	32
Death or withdrawal of surety	33
Liability of former sureties	35

	PAGE
CLERK'S DUTIES	36-39
Disposal of books and papers when clerk changed	40
Duties of Bailiff	41, 42
Duty of constable	48
FEES OF CLERKS AND BAILIFFS	44-49
To be paid by	44
Fees of appraisers	44
What is a proceeding	45
Right of bailiff when action settled	46
Not to collect on commission	47
Disposition of, by clerks	48, 49
Inspector	50
Duties	50, 51
Clerks and bailiffs to report to	52
Returns to be made to	53
JURISDICTION OF COURTS	53-55
Prohibition	55-64
Mandamus	64
Gambling debt	65
Spirituous or malt liquors	66
Tavern or ale house	67
Illegal promissory notes	68
Actions for recovery of land	68-70
Hereditaments, toll, custom, franchise	
Validity of devise, etc	71
Malicious prosecution	71
Libel, slander, criminal conversation	72
Seduction, breach of promise of marriage	78
Actions against justices of the peace	73
Cases in which court has jurisdiction	78
	74, 78 74, 78
Personal actions	75
Actions on contract, etc	75
Where claim ascertained by signature	75
Judge may make orders agreeable to equity and good consci-	10
ence	78
Judgment for payment in money	79
In replevin	79-83
	83-85
	86-87
Powers of Courts	88
	88-95
	88-91
*** ** * * * * * * * * * * * * * * * * *	88-89

CONTENTS.

PAGE.		PAGE.
36-39	Powers of Courts—Continued.	
40	Sequestration	90-95
41, 42	Attachment	91
•••••• 43	Defence and counter-claim91	
44-49	Relief against third parties	98
44	Where defence involves matter beyond jurisdiction	
44	No privilege to exempt from jurisdiction	99
45	MINORS MAY SUE FOR WAGES	99
••••• 46	Master and servant1	00-101
47	Splitting causes of action	02 - 106
48, 49	Certiorari	06-108
50	PROCESS AND PROCEDURE	109
50, 51	Division in which actions to be tried	09-116
52	Changing place of trial1	16-120
58	When action entered in wrong court	
53-55	Actions by and against clerks or bailiffs1	23, 124
55-64	Actions by and against Judge or stipendiary magistrate	125
64	Trial by consent	125
65	Service of papers in other divisions	126
66	Notices to be in writing	126
67	Entry of claim, service, etc	
68	Service of summons1	29-132
68-70	General Provisions	133
70, 71	Substitutional service1	33-135
71	Service on corporations firms or individuals not resident in	
71	Ontario1	
72	Postage	138
73	Service of process at a distance	,
73	Affidavits of service	139
74, 78	Mileage	149
74, 78	Partners and Joint Debtors	40-145
75	Adding Parties	42-145
75	JUDGMENT BY DEFAULT	145
75	Where specially indorsed summons	145
onsci-	Setting aside judgment	148
78	Where defendant does not appear	150
79	MOTION FOR JUDGMENT	153
79-83	Plaintiff's affidavit	155
83-85	Notice of motion	157
86-87	Setting up defence	158
88	Examination of defendant	160
88-95	Leave to defend	161
88-91	Withdrawal of defence	162
88-89	NOTICES BY CLERK	162

CONTENTS.

	GE.
	162
	164
	164
	165
	166
	167
	169
Who may appear as agent	170
TENDER AND PAYMENT INTO COURT	176
Payment into Court in satisfaction of claim 176-1	177
Set-off and Statutory Defences	179
	179
Statutes of Limitations 180-1	
	187
	187
•	188
	188
	193
	194
	195
	195 199
	1.99
Examination of witnesses whose attendance at trial cannot	199
	203
- Grand Francisco	$\frac{204}{206}$
	206
	207
JUDGE'S DECISION	208
New Trial 2	212
APPEALS	216
	222
Security	224
Agent for service	227
	228
Setting down	229
	280
	231
Juries	243
	244
	244 246
Claims not attachable	248

CO	VII	1	NΠ	TQ.

..... 171-176 176-177

..... 180-187

cannot

.....232-243

 xiii

	PAGE.
GARNISHMENT OF DEBTS—Continued.	251
Rights of other parties Debts due for wages	251
Saving clause as to certain debts	258
Attachment of debts due for wages, etc	
Memorandum on summons	
Attaching orders, where claim is a judgment	
Payment by garnishee	260
Effect of order	
Payment to any but primary creditor void	
Primary creditor may summon garnishee	
Service on corporation when head office out of Ontario	
Mode of service	
Judgment at hearing	
When claim not a judgment	
Judgment in such cases	
General provisions	
Service to bind debt	
Costs	
Summons, etc., to be filed	276
Discharge of debt	
Security from primary creditor	
Adverse claims	
Adjournment of proceedings	
Debt attachment book	282
Arbitration	288
Confessions of debt	288
Costs	289
Counsel fees	
PROCEEDINGS NOT TO BE SET ASIDE FOR MATTER OF FORM	
JUDGMENT AND EXECUTION	
Execution	
Transcript of judgment	
Transcript to County Court	
Sale of equity of redemption	
Money and securities	
Sale of goods	
Sheriff may intervene	
Examination of Judgment Debtors	320
Consequences of refusal or neglect to attend	325
Commitment	
Execution of warrant	388
Return of commitments	386
Absconding Debtors	888

CONTENTS.

CLAIMS OF LANDLORDS AND OTHERS IN RESPECT TO GOODS SEIZED	855
Interpleader proceedings	
Provisions in relation to rents due to landlords365-	260
	369
	272
	373
	374
Negligence of bailiffs374,	375
	377
	378
Demand of perusal and copy of warrant	378
Plea of not guilty by statute	381
GENERAL PROVISIONS AS TO ACTIONS FOR THINGS DONE UNDER THIS	
	382
Distress not to be unlawful by reason of defects	382
	383
Notice of action	383
	386
	386
	387
DISPOSAL OF MONEYS PAID INTO COURT	337
	883
	389
Board of county judges, appointment and powers of390-	
	392 393
Expenses provided for	
Canada - and canada administration of the control of the canada and canada an	394
	394
Separate estate395-	
	399
	400
	400
	401
	402
	402
Schedule	403
Covenant by officers	403

TABLE OF CASES CITED.

A.

PAGE.

855

369 272

373 374

378

378

381

382

382

383

383

386

386

387

337

388

389

393

394

394

400

400

401

402

402

408

403

.....390-392

......393, 394

......395-399

IZED

· · · · · · . 356-365 · · · · · · . . 365-369

.....374, 375

DER THIS

Abbeyleix Guardians v. Sutcliff, 33 Abbott v. Andrews, 188 Aberys twith Pro. Pier Co. v. Cooper, 112 Abley v. Dale, 328 Abra ham v. Newton, 201 Abrath v. N. E. Ry. Co., 351 Ackermann v. Ehrensperger, 28 A'Court v. Cross, 184 Adam v. Townend, 144 Adams, In re, 303 Trusts Re, 398 v. Ackland, 19 v. Blackwell, 358 v. Corfield, 196 v. Gillem, 248 v. G. W. Ry. Co., 112, 137 Addison v. Gray, 286 Adey v. Deputy Master of Trinity House, 68 Adkin v. Frind, 104 Ahrens v. McGilligat, 61, 112, 113, 137, 257, 260, 268, 393 Ainsworth v. Creeke, 309 Aitcheson v. Mann, 152 Aitkin v. Dunbar, 97 Alanson v. Walker, 156 Alcock v. Royal Exch, Ass. Co., 197 Alden v. Beckley, 144, 149 v. Boomer, 247 Aldred v. Constable, 319 v. Hicks, 130 Aldrich v. Aldrich (Addenda), 55 Aldridge v. Harper, 87 v. Medwin, 256 Alexander v. Brown, 173 v. Dixon, 190

v. Jones, 111

v. Fairfax Cheese Co., 147

v. McTavish, 4, 181

Allan v. Liverpool, 254

v. Carey, 164

Allcock v. Hall, 215 Allen v. Bussey, 147

Allen v. Geddes, 256 v. Gibbon, 358 qui tam v. Jarvis, 19 v. Mathers, 168 v. McQuarrie, 383 v. Yoxall, 189 Allison, Re, 27, 378 v. Frisby, 186 Allman v. Kensell, 151, 208 Alpha Oil Co. v. Donnelly, 85 Alsept v. Eyles, 333 Alston v. Trollope, 187 Allwright v. Perks, 384 Amend v. Murphy, 301 Ames v. Birkenhead, 95, 252 Amey v. Long, 191 Amor v. Fearon, 101 Amos v. Smith, 186 Ancketill v. Baylis, 254 Ancona v. Marks, 157 Anderson v. Anderson, 200 v. Bank of B. C., 192 v. Barber, 30, 278, 282 v. Calloway, 358 v. Grace, 383, 384 v. Hamilton, 83 v. Hay (Lady), 399 v. Jellett, 71 v. McEwan, 82 v. Shaw, 164, 175 v. Titmas, 214 Anderton v. Johnston, 148, 149 Andrews v. Marris, 18, 291 v. Russell, 344 v. Sharp, 375 Angell v. Baddeley, 221 Anglehart v. Rathier, 332 Anglin v. Minis, 81 Anglo-American v. Rowlin, 362 Anglo-Indian Bank v. Davies, 94 Anlaby v. Prætorius, 150 Apothecaries Co. v. Jones (Addenda),

Appleby v. Baker, 19, 20

v. Franklin, 72 Applegarth v. Graham, 81, 384 Appleton v. Lepper, 213, 377 Apthorpe v. Apthorpe, 249, 250, 253 Archer v. Archer, 94

v. English, 177 v. Hale, 87

Archibald v. Hubley, 119 v. McLaren, 352

Aris v. Orchard, 111

Armour v. Walker, 196 Armstrong v. Douglas, 246, 251

Armstrong v. Douglas, 246, 251 v. Milburn, 182

Arnitt v. Garnett, 367 Arnold v. Hamilton, 84

v. Higgins, 82, 345 Arnott v. Bradly, 332, 333, 385

Arpin v. Reg., 167 Ash v. Dawnay, 305

Ashby v. Sedgwick, 231 Ashcroft, In re, 119 Ashley v. Harrison, 382

Ashley v. Taylor, 144 Ashworth v Outram, 49 Askew v. Hayton, 108

v. Manning, 11 Aspey v. Jones, 379 Astley v. Weldon, 96

Astor v. Merritt, 300 Atkins v. Kilby, 379, 380

Atkinson v. Third Equitable Benefit, etc., Society, 180

Atkyns v. Kinnier, 114 Attack v. Bramwell, 245 Attenborough v. London & St.

Katharines Dock Co., 359 Attorney-General v. Cast Pia Glass Co, 44

Attorney-General v. Churchili, 75

v. Davison, 197, 297 v. Gooderham, 196

Attorney-General v. Leathersellers Co., 190

v. O'Reilly, 389 v. Rogers, 214 v. Sillem,

v. Toronto, 43 v. Walker, 182

Attwood v. De Forrest, 301 Atwood v. Chichester, 131, 135, 149,

150 v. Miller, 98

v. Taylor, 210 Augustien v. Challis, 367

Austin v. 1) owling, 72

v. Mills, 8, 5, 292 Avards v. Rhodes, 59 Awberry v. McLean, 98

Aykroyd, Re, 104

Aylesford v. G. W. Ry. Co., 322, 894, 401, 402

В.

Babcock v. Mun. Council of Bedford, 119

Baby v. Ross, 227

Backhouse v. Bright, 60, 212 Bacon v. Cresswell, 284

v. Langton, 86

Badcock v. Cumberland Gap Park Co., 113

Baddeley v. Gilmour, 201 Badeley v. Consolidated Bank, 251 Baggalay v. Borthwick,

Baggalay v. Borthwick, Bagge v. Whitehead, 315

Baggett v. Meux, 399 Bahia & San Francisco Ry. Co., In re, 274

Baildon v. Walton, 186 Bailey v. Bailey, 5, 147

v. Bryant, 112 v. Macaulay, 237 Baillie v. Goodwin, 114 Bain v. Gregory, 118, 256

Bain v. Gregory, 118, 256 Baines v. Bromley, 179 Baird v. Almonte, 59

> v. Nolan, 248 v. Story, 216, 328, 370

Baker *Re*, 223 v. Bradley, 399

v. Cave, 20 v. Coghlan, 132 v. Dening, 77

v. G. T. Ry. Co., 163 v. Jackson, 201

v. Wait, 112 Baldwin v. Benjamin, 151

v. Kingstone, 263 Bales v. Wingfield, 319

Balfour v. Ellison, 212, 301 Balke, *Re*, 491 Ball v. G. T. Ry. Co., 69

v. Parker, 187 Ballard, In re. Lovell v. Forester, 182 Balsom v. Robinson, 398 Bamford v. Clewes, 375

Bamford v. Clewes, 375
Bank v. Vankoughnet, 216
Bank of Bengal v. Fagan, 219
Bank of B. N. A. v. Eddy, 226

Bank of B. N. A. v. Eddy, 232 v. Strong, 351 Bank of Hamilton v. Durrell, 302 v. Isaacs, 213

v. Stark, 168
Bank of Minnesota v. Page, 158, 159
Bank of Montreal v. Cameron, 328

Council of Bedht, 60, 212
l, 284
86
rland Gap Park
ur, 201
dated Bank, 251
wick,
ad, 315
399
neisco Ry. Co., In

, 186 , 147 112 y, 237 , 114 18, 256 , 179 59 8 6, 328, 370

212, 301 o., 69

ll v. Forester, 182 n, 398 , 375 net, 216 Fagan, 219 . Eddy, 232 . Strong, 351 v. Durrell, 302 v. Isaacs, 213 v. Stark, 168 v. Page, 158, 159 Bank of Montreal v. Douglass, 288 v. Gilchrist, 69 v. Little, 361 v. Munroe, 294, 298

> v. McFaul, 29 v. McTavish, 315 v. Poyner, 56, 57 v. Statten, 165, 220, 221

v. Yarrington, 275 Bank of New South Wales v. O'Connor, 175, 277

Bank of Nova Scotia v. Ward, 352 Bank of Ottawa v. Johnston, 159 v. McLaughlin, 75,

91, 157, 158, 219, 393 v. Smith, 29, 46 v. Wade, 58, 208

Bank of Toronto v. Burton, 147, 248 v. Hall, 295 v. McDougall, 65

v. Wilmott, 29 Bank of Upper Canada v. Wallace,

252
Bank of Whitehaven v. Thompson,

136 Banks v. Self, 261 Banner v. Berridge, 183

Banner v. Berridge, 183 Barber v. Bingham, 143 v. Blaiberg, 98 v. Daniel, 293

v. Daniel, 293 v. Russell, 159 v. Wood, 189, 190 Barclay v. Sutton, 82

Bardell v. Miller, 147 Baring and Doulton, In re, 285 Barker v. Furlong, 353

v. Palmer, 118, 129, 220, 222, 233, 296

v. Westover, 395 Barneds Banking Co. (Ltd.) v. Reynolds, 181

Barnes v. Cox, 107, 108 v. Marshall, 103, 110 v. Metcaife, 185

v. Williams, 190 Barnesdall v. Stretton, 226 Barnum v. Turnbull, 211 Barr v. Clarke, 221

Barrack v. McCullough, 397 Barrett v. Deere, 172

v. Long, 237
Barrie Gas Co. v. Sullivan, 100
Barringer v. Handley, 135
Barrow v. Capreol, 339
Barry v. Barclay, 201

D. C.A.-b

Bartholomew v. Rawlings, 98 Bartlett v. Wells, 27 Barton v. DeGros, 385

Barwick v. De Blaquiere, 119, 323

Baskerville v. Vose, 387 Bateman v. Pinder, 185 Bates v. Chisholm, 214

v. Mackey, 85, 86 v. Walsh, 385 Bath v. White, 68

Bathard v. London Sewers Co., 114

Baxter v. Nurse, 100 Bayley v. Rimmell, 101 Baylis v. Dinley, 27

Bayly v. Borne, 212 Bazett v. Morgan, 219 Beach v. Odell, 197

Beal v. South Devon Ry. Co., 204 Bean v. Wade, 182

Beard v. Knight, 367 v. Steele, 197

Beasley v. Roney, 398 Beaty v. Fowler, 39, 49

v. Hackett, 251, 252, 265, 280

Beatty v. Maxwell, 227 v. Rumble, 299 Beauchamp v. Cass, 119 Beaupre's Trusts, Re, 398 Beebe, in re, 332 Becher v. McDonald, 99 Beck v. Mordant, 149 Becker v. Hall, 86

Beckett v. Tasker, 399, 400 Beckitt v. Wragg, 224 Beemer v. Oliver, 402 Beeston v. Collyer, 100 Becketing, The 222

Beeswing, The, 222 Begg v. Cooper, 155 Belcher v. Goodered, 120 Belhouse v. Mellor, 274

Bell, Re. Lake v. Bell, 187 v. Black, 2 v. Lamont, 212 v. Manning, 29 v. Oakley, 379 v. Riddell, 395

Bell Telephone Co. and Minister of Agriculture, 55

Bellamy v. Hoyle, 375, 394 v. Jones, 200, 201

Belmont v. Aynard, 359 Belt v. Lawes, 214 Benedict v. Boulton, 164

Bennett v. Bayes, 304 v. Brumfit, 59, 77

v. Davis, 398 v. Parker, 174 v. Potter, 148

Bennett v. Powell, 298, 327 v. White, 188, 387 Bentley v. Vilmont, 83 Berdan v. Greenwood, 177, 196, 200, Beresford v. Armagh (Archbishop), Beresford-Hope v. Sandhurst, 170 Berkeley v. Elderkin, 5 v. Thompson, 137 Berridge v. Berridge, 80 v. Fitzgerald, 118 Berrington v. Phillips, 210 Berry v. Exchange Trading Co., 281 v. Zeiss, 157 Berryman v. Wise, 13 Beswick v. Boffay, 217 Bethell, Re. Bethell v. Bethell, 184 Betteley v. McLeod, 190 Betterbee v. Davis, 173 Bettes v. Farewell, 210 Betts v. G. T. Rv. Co., 192 Bevans v. Rees, 174 Bice v. Jarvis, 248 Bickford v. Welland Ry. Co., 93 Bidder v. Bridges, 200 Biddlecombe v. Bond, 33 Biddleson v. Whitel, 4 Biddulph v. Gray, 156 Bigelow v. Bigelow, 19 Bilbie v. Lumley, 263 Bingham v. Allport, 172 v. Cabbot, 59 Birch, Re, 60 v. Birch, 249 Bird v. Barstow, 160 v. Brown, 309 Birdsall v. Corp. of Asphodel, 11 Birk v. Guy, 184 Birnie v. Marshall, 70 Bishop, Ex parte, 209 v. Holmes, 322 Bissell v. Williamson, 55 Bissicks v. Bath Colliery Co., 294 Black v. Allen, 174 v. Smith, 172, 173 v. Wesley, 107 Blades v. Arundale, 359 v. Lawrence, 18, 31 Blake v. Beech, 36, 158, 378 v. Shaw, 100 v. Walsh, 157 Blakeley v. Blaase, 189 Bland v. Andrews, 60, 247

v. Bland, 134

Blaney v. Hendricks, 209

101

v. Rivers, 59, 212, 861, 364

Blencarn v. Hodge's Distillery Co.,

Blenkairne v. Statter, 224 Bletcher v. Burn, 84, 86 Blewitt v. Gordon, 149 Bloor v. Huston, 362 Bloxam v. Sanders, 82 Blyth v. Birmingham, W. W. Co., Blyth v. Fledgate, 181, 182 Boast v. Frith, 101, 326 Boddy v. Leyland, 226 Bodenham v. Purchas, 277 v. Ricketts, 56 Boelan v. Melladew, 198 Boice v. O'Loane, 4, 181 Boileau v. Rutlin, 4 Bold's Bail, 225 Bolton v. Williams, 396 Bolton Partners v. Lambert, 309 Bonaker v. Evans, 36 Bonar v. Macdonald, 29 Bond v. Conmee, 381, 385 Bongard v. McWhirtier, 62 Bonner v. Lyon, 396 Bonser v. Cox, 27 Book v. Ruth, 95 Boorman v. Nash, 245 Booth v. Clive, 18, 383 v. Preston and Berlin Ry. Co., 360 v. Trail, 246, 247, 249 v. Turle, 231 v. Vicars, 122 Bordier v. Burrell, 232 Borough of Freeport v. Marks, 59 Borradaile v. Nelson, 136 Borthwick v. Walton, 110 Boston Deep Sea Co. v. Ansell, 101 Boswell v. Roberts, 130 Bouch v. Sevenoaks, 247 Bouchier v. Patton, 149 Boughner v. Meyer, 66 Boultbee v. Burke, 185 Boulton v. Smith, 298 Bowden, Re. Andrew v. Cooper, 187 Bowen, Re, 61, 69 v. Evans, 108 v. Webber, 68 Bowerman v. Phillips, 301 Bowes v, Fenwick, 124 v. Caustic Soda Syndicate (Addenda), 159 Bowie, Re, 111 Bowles v. Johnson, 189

Bowman v. Bowman, 247 Bown, Re. O'Halleran v. King, 399

v. Child. 201

Boyce, In re, 328, 335

Box v. Green, 104, 372, 377

er, 224 84, 86 149 62, 82 am, W. W. Co., 181, 182 , 326 226 has, 277 etts, 56 v, 198 4, 181 8, 896 Lambert, 309 36 d, 29 81, 385 irtier, 62 96 245 388 and Berlin Ry. 3, 247, 249 22 rt v. Marks, 59 on, 136 on, 110 o. v. Ansell, 101 130 8, 247 , 149 , 66 185 298 w v. Cooper, 187 68 ps, 301 124 Soda Syndicate la), 159 189 n, 247 ran v. King, 399

372, 377

Boyd v. Brander, 228 v. Hayes, 95 v. Haynes, 147, 248, 250 Boyle v. Bettws Coll. Co., 95 v. Ward, 339 Boys v. Simpson, 249 v. Smith, 84 Boyse, Re. Crofton v. Crofton, 196 Brackenbury v. Laurie, 358 Bradbury, Ex parte, 326 Bradlaugh, Ex parte, 108 Bradley v. Baylis, 254 v. Chamberlyn (Addenda), 155, 161 v. Fisher, 59 Bradshaw v. Duffy, Re, 69 Bradt v. Bradt, 203 Brady v. Jones, 173 Braham v. Sawyer, 156 Braine v. Hunt, 358 Bramstein v. Lewis, 394 Bramston v. Robins, 277 Brandon v. Hibbert, 66 Brandt v. Craddock, 71 Branscombe v. Scarborough, 245 Branwhite, Ex parte, 97 Brash, qui tam, v. Taggart, 147 Breed, Re, 255 Breedon v. Capp, 62 Brega v. Hodgson, 168 Brenan v. Morrisey, 249 Breslauer v. Barwick, 97 Brett v. Smith, 119 Breull, Ex parte, 111 Brice v. Bannister, 128 Bridge v. Branch, 312 Bridger v. Savage, 65 Bridges v. Douglas, 112 Brigden v. Heighes, 68 Briggs v. Briggs, 8 v. Evelyn, 383 Brigham v. Smith, 180 Brighton Arcade Co, v. Dowling, 316 Brindley, Ex parte, 253 Briscoe v. Stephens, 56 British Industry Life Ass. Co. v. Ward, 220 Britton v. Rossiter, 102 Broad v. Ham, 352 v. Perkins, 56 Brock v. McLean, 164 Bromley, Ex parte. In re Redfearn, Brook v. Hook, 309 Brookfield v. Brooke (School Trustees), 65 Brooks v. Aylmer, 159

Bross v. Huber, 388 Brown v. Blackwell, 170 v. Cinqmars, 288 v. Couking, 61, 69 v. Croft, 101 v. Gossage, 141 v. Gugy, 228 v. London & N. W. Ry. Co. 113 v. Merrills, 247 v. Muller, 245 v. Murray, 169 v. McGuffin, 251 v. Nelson, 97, 803 v. Overbury, 66 v. Paxton, 28 v. Ruttan, 366 v. Rutherford, 182 v. Sage, 98 v. Shaw, 220, 233, 290 v. Wright, 28 v. Wildbore, 156 v. Zimmerman, 81 Browne v. Smith, 152 Bruce v. Hunter, 209 Brune v. Thompson, 177 Brunsden v. Humphrey, 3, 104 Brunskill v. Powell, 103 Bryce v. Kinnee, 357, 361 v. Salt, 157 Brydges v. Fisher, 195, 201 Bryson v. Clandinan, 164 Bubb v. Yelverton, 65 Buccleugh (Duke) v, Eden, 184 Buchanan v. Frank, 293 Buck v. Hunter, 385 Buckley v. Cooke, 202 v. Ham, 111, 113 Buckmaster v. Russell, 182 Buffalo & Lake Huron Ry. Co. v. Brooksbanks, 309 Buffalo & Lake Huron Ry. Co. v. Hemingway, 57 Buffington v. Gerrish, 82 Buggin v. Bennett, 56 Building & Loan Assn. v. Heimrod, 91, 143, 394 Bullen v. Moodie, 36, 45, 54, 194, 328 Bullock v. Caird, 144 v. Dunlap, 292 Bunbury v. Fuller, 61 Bunnell v. Whitelaw, 197 Burgess v. Tully, 308, 310, 311, 312 B18 Burke v. Glover, 87, 283 v. McWhirter, 82 Burling v. Harley, 383 Burlinson v. Hall, 128

Burn v. Belcher, 84, 212 Burnell v. Hunt, 141 Burnet v. Hope, 101 Burnham v. Hall, 392 Burns v. Butterfield, 64 v. Rogers, 77

Burr v. Marsh, 65 v. Munroe, 83

Burrowes, In re, 57, 62, 166, 168, 208,

Burstall v. Tanner, 402 Burstall v. Boyfus, 78 v. Fearon, 217 Burton v. Roberts, 246, 247 Buse v. Roper, 125

Bush v. Fry, 82 v. Pimlott, 82 Bushell v. Moss, 61, 68, 69 Bussche v. Alt, 319 Bustros v. White, 192 Butler v. Ablewhite, 112

Butler v. Butler, 394, 401 v. Ford 13 v. Knight, 170, 245 v. Rosenfeldt, 337

Butt, v. Newman, 379 Butters Ex parte, 155, 221 Butterworth v. Walker, 60 Button v. O'Neill, 208

v. Thompson, 100 v. Woolwich Building Socy, 231

Byrne v. Knipe, 321

C.

C's settlement, 399
Cadman v. Lubbock, 173
Caine v. Coulton, 277
Caird v. Fitzell, 151
Cains v. Ottawa (Water Comrs.), 182
Caisse v. Tharp, 250
Calcutt v. Ruttan, 84
Calder v. Halkett, 18, 383
Caledon (Trustees) v. Caledon (Tp.) 375
Caledonian Ry. Co. v. Lockhart, 286
Calverly v. Smith, 294
Calvert v. Moggs, 381
Calmbefort v. Chapman, 4

Cameron v. Allen, 154, 217, 270, 279 v. Campbell, 138, 182, 324

v. Heighs, 157 v. Rutherford, 157 v. Wait, 118, 152, 241 Campbell v. Barrie, 307, 308 v. Beamish, 213 v. Cole, 398

v. Coulthard, 804, 818, 844, 858

v. Cushman, 359 v. Davidson, 290 v. Lepan, 82

v. Madden, 32, 313 v. Peden, 147, 250

Canada Central Ry. Co. v. Mnrray,

Canada Cotton Co. v. Parmalee, 95, 247, 260

Canada Farmers M. Ins. Co. v. Welsh, 115

Canada Guarantee Co. v. Milne, 30 Canada Southern Ry. Co. v. Gebhard, 111

Canada West F. M. & S. Ins. Co. v. Merritt, 28 Canadian Bank of Commerce v.

Crouch, 252 Canadian Bank of Commerce v.

Gourlay, 68
Canadian Bank of Commerce v.
Northwood, 96

Canadian Bank of Commerce v. Tasker, 362

Canadian Bank of Commerce v. Woodcock, 157

Canadian Land & Emigration Co. v. Dysart, 5, 208

Canadian Pacific Ry. Co. v. Grant, 303

Candy v. Maughan, 358 Cannan v. Wood, 277 Canniff v. Bogart, 80, 87

Cannon v. Toronto Corn Exchange, 15, 59

Cappeleus v. Brown, 98 Carey v. Lawless, 148, 257

Carlill v. Carbolic Smoke Ball Co., 65 Carlisle v. Orde, 156, 157

Carmarthen & Cardigan Ry. Co. v. Manchester and Milford Ry. Co., 37

Caron v. Graham, 81, 342, 345, 348, 361

Carpenter v. Mason, 329 v. Pearce, 361 v. Vanderlip, 182

Carr v. Baycroft, 262 Carroll v. Lunn, 309 v. Potter, 342

Carruthers v. Graham. 196 v. Reynolds, 295

rie, 807, 808 imish, 213 e, 398 ulthard, 804, 818, 4, 353 hman, 359 vidson, 290 pan, 82 dden, 32, 313 en, 147, 250 Ry. Co. v. Mnrray, Co. v. Parmalee, 95, s M. Ins. Co. v. ee Co. v. Milne, 30 n Ry. Co. v. Geb-M. & S. Ins. Co. of Commerce v. of Commerce v. of Commerce v. 96 of Commerce v. of Commerce v. 57 & Emigration Co. 208 Ry. Co. v. Grant, an, 358 , 277 t, 80, 87 to Corn Exchange, wn, 98 , 148, 257 Smoke Ball Co., 156, 157 ardigan Ry. Co. v. and Milford Ry. , 81, 342, 345, 348, on, 329 ce, 361 derlip, 182 26209

342

ham. 196

nolds, 295

Carsley v. Fiskir. 110 Carter v. Smith, 60 v. Stowart, 362 Carveth v. Fortune, 285 v. Greenwood, 84 Cartwright v. Gray, 92 v. Hinds, 111, 340 Carus Wilson's Case, 369, 370 Caspar v. Keachie, 13, 45, 181 Castelli v. Groom, 200 Castle v. Ruttan, 297, 298 Caston's Case, 3 Castrique v. Imrie, 83 Caswell v. Catton, 86 Cataraqui Cemetery Co.v. Burrowes, Cathcart v. Haggart, 185, 186 Caton v. Rideout, 401 Catton v. Gleason, 382 Caudle v. Seymour, 339, 377 Cavendish v. Greaves, 97 Cazenove v. Vaughan, 202 Chabot v. Morpeth, 55 Chadd v. Meagher, 214 Chadwick v. Ball, 257 Challie v. York, 209 Chambers v. Chambers, 108 v. Green, 62 Chamberlain v. King, 383 v. Macdonald, 398 Chandler v. Grieves, 101 v. Sanger, 349 Chapman v. Auckland Union, 384 v. Biggs, 94, 249 v. Davis, 189 v. Knight, 165 v. Speller, 296 v. Withers, 221 Chard v. Jervis, 327 v. Rae, 4, 182 Charles v. Branker, 177 Charlton v. Charlton, 232 Chasemore v. Turner, 182, 183 Chatfield v. Comerford, 351 Chatterton v. Watney, 249, 261, 262, Cheese v. Scales, 3 Cheshire v. Burlington, 255 Cheslyn v. Dalby, 183 Chew v. Holroyd, 62, 69 Chichester v. Gordon, 41, 327 Chinn v. Bullen, 393 Chisholm v. Doulton, 239 v. Morse, 4 v. Oakville, 61, 62 v. Prov. Ins. Co., 316 Chivers v. Savage, 60, 71 Christie v. Unwin, 54

Christmas, Re, 70 v. Eick, 181 Christopher v. Croll, 118 Christopherson v. Lotinga, 119, 323 Churcher v. Stringer, 209 Churchill v. Siggers, 293 Churchward v. Coleman, 18, 362 Citizens Ins. Co. v. Parsons, 24 City of Kingston v. Brown, 132 v. Shaw, 366 Clark v. Cullen, 145 v. Woods, 349 Clarke, In re, 54 v. Barron, 164 v. Cookson, 234 v. Bradlaugh, 296 v. Davey, 379 v. Easton, 299 v. Fuller, 157 v. Garrett, 308 v. McDonald, 91, 98, 157, 158, 246, 257, 393 v. Roche, 220 v. Ruttan, 84 v. Saffery, 191 v. Skipper, 234 v. Union Ins. Co., 3 v. Woods, 379, 380 doe d v. Thompson, 189 Clarkson v. Musgrave, 218, 384 v. Severs, 297 Clay Com. Telephone Co. v. Root, Cleave v. Jones, 186 Cleghorn v. Munn, 57 Clement v. Kirby, 387 Clements, Re, 371 Clerk v. Withers, 319 Clifton v. Davis, 562 Clinton v. Peabody, 196 Close v. Phipps, 349 Clough v. London & N. W. Ry. Co., Coates, Ex parte. In re Skelton, 338 Cobb v. Charter, 349 Cobbett v. Hudson, 170 Cock v. Allcock, 196 Cochrane v. Hamilton Pro. & Loan Society, 4 v. Moore, 314 Cockerell v. Van Dieman's Land Co., 160 Codrington v. Lloyd, 148 Codd v. Cabe, 380 Coe v. Coe, 59, 61 Coehn v. Waterhouse, 225, 226 Coffin v. Dyke, 366, 372 Cohen v. Hale. 246, 251

v. Palmer, 319

v. Switzer, 27

v. New River Co., 15

v. Cooper, 231

v. Lawson, 262

v. Macdonald, 397

v. Wandsworth District, 86

Coke v. Jones, 212 Cook v. Grant. 182, 187 Cole v. Davis, 294 v. Miles, 68 Cooke v. Gill, 110 v. Sherard, 296 Colebrooke v. Dobbs, 168 Cool v. Mulligan, 82 Coleman, In re, 9 v. G. E. Ry. Co., 128 Cooley v. Smith, 213 v. Glanville, 95 Coolican v. Hunter, 18, 64 v. Kerr. 81 Cooper, Ex parte. In re Baum, 296 v. Brayne, 262 Colin Campbell, In re, 130 Collie, In re, 126 Collinge v. Heywood, 181 Collingridge v. Paxton, 315 Collins v. Collins, 316 v. Nickon, 159 v. Rose, 380 Collis v. Groom, 147 v. Lewis, 221, 364 v. Stack, 183 Colloden v. McDowell, 361 Colonial Bank of Australasia v. Willan, 60 Colvin v. Buckle, 180 v. Rich, 248 Combined Weighing & Ad. M. Co., Re, 261, 262, 281 Comfort v. Betts, 128 Commercial Bank v. Hughes, 164 v. Jarvis, 249 v. Wilson, 301 v. Woodruff, 288 Commins v. Scott, 18 Commissioner of Railways v. Brown, 163 213 Comstock v. Burrows, 197 v. Galbraith, 198 v. **Harris**, 189 v. Tyrrell, 198 Concha v. Concha, 8 Congrieve v. Evetts, 366 Conmee v. C. P. Ry. Co., 60, 159, 192, 284, 285 Connan, Re. Ex parte, Hyde, 261 Connecticut Mut. Fire Ins. Co. v. Kavanagh, 219 Connecticut Mut. Life Ins. Co. v. Moore, 164, 230 Connell v. Hickock, 357 Connelly v. Bremner, 21 Connors v. Birmingham, 92 v. Darling, 377 Connebeare v. Farries, 231 Consumers Gas Co. v. Kissock, 156 Cook v. Allen, 358 v. Birt. 331

v. Cook, 365

v. Dev. 136 v. Fowler, 81

Coore v. Callaway, 174 Copeland v. Blenheim, 138 Copeman v. Hart, 103 Copping v. McDonell, 108 Coquillard v. Hunter, 81 Corbett v. Johnston, 81 v. The General Steam Nav. Co., 114 Coren v. Barnes, 259 Cork & Bandon Ry. Co. v. Goode, 352 Corlett v. Roblin, 108 Cormick v. Ronayne, 252 Cornforth v. Smithard, 183 Cornish v. Abington, 166 Cornwall v. The Queen, 378 Cornwell v. Sanders, 68 Corp. of Haldimand v. Martin, 140 Ontario v. Paxton, 29 Rawdon v. Ward, 28 Vespra v. Cook, 140 Welland v. Brown, 33 Corsant qui tam v. Taylor, 5 Cotes v. Davis, 170 Cotton v. Cadwell, 379 v. Mitchell, 182 v. Vansittart, 252 Couling v. Coxe, 190 Coulson v. O'Connell, 70 v. Spiers, 221 Court v. Scott, 132 v. Sheen, 159 Cousins v. Bullen, 128 v. Lombard Bank, 218 Cowan, Ex parte, 58 v. Carlill, 261 v. McQuade, 394 v. O'Connor, 110 Cowing v. Vincent, 182 Cowley v. Local Board, 236 Cox v. Balne, 358, 367 v. Bennett, 401 v. Brain, 171 v. Hamilton Sewer Pipe Co. 885 Coyne v. Broddy, 187

2, 187 r Co., 15 r, 18, 64 n re Baum, 296 262 231 262 ald, 397 orth District, 86 174 eim, 188 108 ell, 108 ter, 81 n. 81 neral Steam Nav. 14 59 Co. v. Goode, 352 108 ne, 252 hard, 183 n, 166 ueen, 378 rs, 68 d v. Martin, 140 Paxton, 29 . Ward, 28 Cook, 140 Brown, 83 Taylor, 5 379 182 rt, 252 0 ell, 70 221 128 d Bank, 218 61 , 394 , 110 182

ver Pipe Co. 385

ard, 236

67

Crabtree v. Messersmith, 79 Craig v. Craig, 294, 859, 868 v. Milne, 30 Crampton v. Ridley, 286 Crandall v. Crandall, 180 Crawford v. Beattie, 292, 327, 377, 882 v. Crawford, 185 v. Seney, 61, 70 v. Thomas, 82 Credits Gerundeuse v. Van Weede, 359 Creen, Re, 208 Cremetti v. Crom, 247 Crippen v. Ogilvy, 200 Croft v. Boite, 882 Crombie v. Davidson, 178 Crompton v. Hutton, 190 Cronshaw v. Chapman, 299 Crooks v. Stroud, 326 Croome v. Brantford, 2 Cropper v. Warner, 294, 359 Cross v. Watts, 68 v. Wilkins, 134 v. Williams, 226 Crossman v. Shears, 126 Crowe v. Price, 94, 247 Crowther v. Appleby, 191 v. Elgood, 827 v. Thorley, 113 Crozer v. Pilling, 172 Crozier v. Cundey, 379 Cruickshank v. Corbey, 284 v. Rose, 67 Crump v. Cavendish, 160 Crush v. Turner, 220 Cuckson v. Stones, 101 Culham v. Love, 86, 87 Colloden v. McDowell, 233, 294, 298 Culverhouse v. Wickins, 261, 262, 274 Culverson v. Melton, 381 Cuming v. Toms, 385 Cummings v. Usher, 211 Cundy v. Lindsay, 83, 320 Cunliff v. Whitehead, 197 Curling v. Robertson, 202 Currie v. Hodgins, 29 Currey, Re. Gibson v. Way. 399 Curry, Re, 285

D.

Curtis v. Norris, 250, 267

Curwen v. Milburn, 183

Cutler v. Morse, 188

v. Williamson, 4

v. Wright, 203

Daby v. Gehl, 311, 313 Dakins, Ex parte, 322, 328, 333, 335 Deal v. Potter, 81

Dalby v. Humphrey, 210 Dale v. Cool. 383, 384 v. Heald, 168 Dalling v. Matchett, 11 Dallow v. Garrold, 252, 280 Dame v. Carberry, 859 v. Siater, 27, 397 Danaher, v. Little, 70 Daniel v. Charsley, 224 v. Ferguson, 93 v. Fitzell, 342 v. James, 226 v. Sinclair, 210 Danks, Ex parte, 128 Daragh v. Dunn, 800 Darby v. Waterlow, 359 Darcy v. Carragher, 248 Dark v. Huron and Bruce, 8 Darling v. Collatton, 358, 360 v. Darling, 196 v. Rice, 895 Dartmouth College v. Woodward, 264 Dartnell & Quarter Sessions of Prescott, 45, 192 Davidson v. Belleville & N. H. Ry. Co., 4 v. Douglas, 252 v. Grange, 294 v. Reynolds, 300 v. Taylor, 248 v. Q. S. of Waterloo, 375 Davies, Re, 371 Davies v. Edwards, 186 v. Westmacott, 156 Davies Brewery & M. Co. v. Smith, Davis v. Canada F. M. Ins. Co., 170 v. Flagstaff Silver Mining Co., 99 v. Freethy, 251, 280 v. Lovell, 190 v. Lowndes, 201 v. Moore, 299, 304, 384 v. Pearce, 132, 151 v. Spence, 159 v. Walton, 71 Davy, Doe d. v. Haadon, 13 Davy v. Johnston, 28, 138, 304 Davys v. Richardson, 171 Dawson v. Coleman, 54 v. Moffatt, 398 v. Remnant, 67 Day v. Carr, 371 Dayfoot v. Byrens, 323 Deadman v. Ewen, 19 Deakin v. Lakin. Re Shakespeare. 394

Doe v. Pattisson, 196

v. Ross, 191

Doer v. Rand, 362

Deal v. Schofield, 68 Dean v. James, 173 Dear v. Sworder, 98 Dearmer, Re. James v. Dearmer, 398 Death, Ex parte, 55 Death v. Harrison, 363 Debenham v. Wardroper, 327 De Bussche v. Alt, 274 De Cadaval v. Collins, 349 De Forrest v. Bunnell, 119 De Francesco v. Barnum, 93 De Habar v. Portugal (Queen), 56, 62, 269 Delafield v. Jones, 132 v. Tanner, 149 Delanev v. Moore, 340 Delesdernier v. Burton, 100 Dempsey v. Caspar, 362 v. Dougherty, 386 Dennis v. Seymour, 161 v. Whetham, 294 Dennison v. Knox, 108, 316 Denton v. Marshali, 56, 57 v. Strong, 285 De Pothonier v. De Mattos, 317 De St. Martin v. Davis, 362 Derry v. Peek, 245 Devanney v. Dorr, 284 Devonshire v. Foote, 58 Dewar v. Carrique, 293 v. Sparling, 27, 30 De Winton v. Brecon, 248 Dews v. Riley, 13, 37, 264, 328 Dick v. Tolhausen, 147 Dickenson v. Shee, 172, 173 Dickson v. Jarvis, 180 v. Neath & Brecon Ry. Co. v. Reuter's Tel. Co., 245 Diggle v. Higgs, 66 Dillaree v. Dovle, 295 Dillon v. Cunningham, 327 Dimes v. Grand Junction Canal Co., 19 Dingley v. Robinson, 249 Dingman v. Austin, 397 Dixon, Re Dixon v. Smith, 401 v. Lee, 190 v. Snarr, 61 Doan v. Michigan Cent. Ry. Co., Dobie v. Lemon, 148, 149, 150, 158, 180 Dobson v. Festi, 137, 144 Dodd v. Drummond, 156

Doe v. Derby, 202

v. Kelly, 191

Dolby v. Iles, 177 Dollery v. Whaley, 384, 387 Dolphin v. Layton, 248 Dominion, etc., Co. v. Stinson, 202 Dominion Bank v. Bell, 203 Dominion Sav. & Inv. Co. v. Kilrov. Donaldson v. Haley, 385 Donnelly v. Donnelly, 94, 400 v. Hall, 359 v. Stewart, 5, 147, 281 Donovan v. Brown, 229 Donovan Re. Wilson v. Beatty, 4 Dooby v. Watson, 182 Doran v. Toronto Suspender Co., 233, 358 Doswell v. Impey, 18 Dougall v. Cline, 181 v. Leggo, 60, 105, 106 Dougherty v. Williams, 213 Douglas v. Hutchinson, 107 399 v. Patrick, 172 Dowdell v. Australian Steam Nav. Co., 190 Dover v. Child, 292 Dowling v. Miller, 83 Downe v. Fletcher, 395 Downey v. Patterson, 214 Doyle v. Kaufman, 296 v. Lasher, 233, 360, 364 Dresser v. Johns, 146, 147, 248, 336 Drinkwater v. Clarridge, In re, 55, Duberly v. Gunning, 168 Dublin, Wicklow & Wexford Ry. Co. v. Slattery, 168 Duck v. Bates, 170 v. Braddyll, 365 v. Mazen, 30 Duddin v. Long, 358 Duff v. Barnett, 29 Duffill v. Erwin, 82 Duffus v. Creighton, 299, 366 Dufresne v. Dufresne, 400 Duggan v. Kitson, 295 Duignan v. Walker, 114 Duke of Beaufort v. Crawshay, 201 v. Ashburnham (Earl), 202 Duke of Newcastle, In re, 255 Dulmage v. Judge of Leeds and Grenville, 18 Duncan v. Cashin, 357 v. Fees, 323, 358

Duncan doe d. v. Edwards, 8

384, 387 248 v. Stinson, 202 3ell, 203 v. Co. v. Kilroy,

, 385 y, 94, 400 9 , 5, 147, 251 229

i v. Beatty, 4 32 Suspender Co.,

, 105, 106 ms, 213 son, 107 399 172

an Steam Nav.

395 n, 214 196 , 360, 364 3, 147, 248, 336 idge, *In re*, 55,

168 Vexford Ry. Co.

299, 866 , 400

5

14 Crawshay, 201 Ashburnham

re, 255 f Leeds and

158 17ds, 3 Duncombe v. Brighton Club and Norfolk Hotel Co., 209 Dundas (Town) v. Gilmour, 98

v. Johnson, 213

Dunlap v. Babany, 86

Dunlop v. Higgins, 34

Dunn v. Salter, 338

Dunnett v. Harris, 159, 161

Dunston v. Paterson, 48, 112

Durrell v. Evans, 77

Durrell v. Pritchard, 93

Durrant v. Ricketts, 157

Dutens v. Robson, 60

Dwight v. Macklam, 190

Dyce v. Sombre, In re, 19

Dye v. Dye, 398

Dyke v. Stephens, 217

E.

Earl of Lisburne v. Davies, 115 Earle v. Stoker, 16 Early v. Bowman, 177 v. McGill, 200 East & West India Dock Co.

East & West India Dock Co. v. Kirk, 285 East End Building Society v. Slack,

East End Building Society v. Slack, 321 Lastern Counties Ry. Co. v. Mar-

riage, 141 East India Co. v. Naish, 201 Eastwood v. Miller, 124

Easy, In re, 135 Ebberts v. Brooke, 4, 55, 336 Ecclestone v. Jarvis, 83

Eddie v. Davidson, 295 Eddy v. Ottawa City P. Ry. Co,

Eden v. Weardale Iron & Coal Co., 217

Edgar v. Magee, 182, 384 v. Watson, 177 Edmonds v. Pearson, 189

v. Wallingford, 349 Edward v. Cheyne, 401

Edwards v. Edwards, 95 v. English, 361 v. G. W. Ry. Co., 219

v. G. W. Ry. Co., 216 v. Yates, 174 Eggington v. Litchfield, 27

Eisdell v. Cunningham, 252 Elliott v. Biette, 58, 59, 77 v. Capell, 247 v. C. P. Ry. Co., 201

v. C. P. Ry. Co., 20 v. Norris, 110, 306 Ellis v. Fleming, 62

v. Leftus Iron Co., 245 v. Watt, 60 Elmsley v. Cosgrave, 201

Elphinstone v. Monkland Iron & Coal Co., 96
Elsten v. Pose, 61

Elston v. Rose, 61

Elwell v. Jackson, 249, 251 Ely v. Moule, 211, 293 Emanuel v. Bridger, 261

v. Smith, 270 Emerson v. Brown, 131, 135

Emery v. Barnett, 69 v. Wase, 286

Emes v. Emes, 181, 185 Emma Silver Mining Co., In re, 191

Emmerson v. Heelis, 78 England v. Marsden, 349 English v. Mulholland, 61, 69

Enraght v. Penzance, 61, 69 Erichsen v. Last, 113 Erickson v. Brand, 352

Erwin v. Powley, 130 Escott v. Gray, 145 Esdaile v. Visser, 327

Eureka Woolen Co. v. Moss, 219 European Central Ry. Co, Re, 211

Evans, Ex parte, 62, 95 v. Bremridge, 29 v. Brick, 98

v. Gill, 149 v. Hoare, 77

v. Matthews, 230 v. O'Donnell, 181 v. Roe, 100

v. Sutton, 61, 212 v. Wills, 329, 335 Evelyn v. Lewis, 95

Everard v. Watson, 256 Everard v. Paxton, 396 Eversfield v. Newman, 69 Every v. Wheeler, 149 Ewart v. Latta, 141

Ewing v. Thompson, 108 Exchange Bank v. Barnes, 376 v. Springer, 29, 87 v. Stinson, 92

Eyles v. Ellis, 277 Eyre v. Hughes, 97

F.

Fair v. Bell, 251 v. McCrow, 69

Fairman v. Oakford, 100 Farden v. Richter, 148, 161

Farley v. Graham, 191 v. Lincoln, 83 Farr v. Robins, 5, 312

v. Ward, 209 Farrant v. Thompson, 294 Farrell v. Stephens, 196, 198 Farrow v. Tobin, 363

v. Wilson, 101

Faveiell v. Eastern Counties Ry. Co., 283

Fawcett v. Cash, 100 Fearnside v. Flint, 181 Fearon v. Norvall, 55 Featherstone v. Smith, 93 Federal Bank v. Hope, 159 Fee v. McIlhargey, 60, 140, 212 Fell v. Whittaker, 245, 382

v. Williams, 159 Fellows v. The Lord Stanley, (owners), 391

v. Thornton, 249, 259 Fenwick v. Laycock, 358, 360

v. Schmalz, 352

Ferguson v. Carman, 133, 251, 265 v. Corp. of Howick, 59

v. Earl of Kinnoull, 257 v. Elllott, 120

v. Sampey, 107 Fergusson v. Davison, 179 v. Fyffe, 210

Fern v. Lewis, 184 Ferris v. Eyre, 284

v. Fox. 99 Field, Re, 77

v. Bennett, 135 v. Evans. 399

v. McArthur, 395 v. Rice, 60, 64, 248

Fieldhouse v. Croft, 315 Figg v. Wilkinson, 229

Finch v. Boning, 172 v. Brook, 173

v. Miller, 174 Findlay v. Peden, 191 Finlay v. Chirney, 382

v. Miscampbell, 236 Finlayson v. Howard, 107, 361

Firth v. Bush, 133 Fischer v. Hahn, 200 Fisher v. Berrell, 200

v. Izataray, 196 v. Keane, 8, 15, 120

v. Mowbray, 27

v. Sulley, 341 v. Waltham, 65 Fiskin v. Brooke, 94

v. Chamberlin, 200 Fitzgibbon v. Blake, 896 Fitzhugh v. Lee, 201 Fitzsimmons v. McIntyre, 58 Flamank, Re. Wood, v. Cock, 401 Flarty v. Odlum, 249

Flatt and Prescott, Re. 30

Flatt v. Waddell, 219 Flegg v. Prentice, 94

Fleming v. Livingston, 61 Fletcher, In re, 330

Fletcher v. Baker, 176, 234

v. Calthrop, 45, 336, 378 v. London & N. W. Ry. Co., 164, 213

v. Noble, 362, 393 v. Wilkins, 384

Flett v. Way, 70, 303 Flint v. Corby, 92 Flitters v. Allfrey, 292 Florence v. Drayson, 210 Flower v. Allen, 134

v. Llovd, 220

v. Low Leyton (Local Bd.), 384

Foat v. Margate (Mayor), 384 Foley v. Moran, 59, 212, 361, 364

Folger v. McCallum, 119 v. Minton, 80, 384

Foord v. Noll, 174 Foot v. Baker, 65

Forbes v. Michigan Cent. Ry. Co.,

v. Wells, 196 Ford v. Baynton, 358

v. Crabb, 64

v. Harvey (Addenda), 159

v. Spafford, 187 v. Taylor, 232, 234 Fordham v. Akers, 80 Forfar v. Climie, 76

Forrester v. Thrasher, 296 Forsdike v. Stone, 41, 371

Forster, Re, 62 Foster v. Emory, 218

v. Geddes, 3 v. Glass, 298

v. Green, 219 v. Reeves (Addenda), 75, 91 v. Smith, 298

v. Temple, 60

v. Usherwood, 125 v. Van Wormer, 323, 326

v. Weston, 209 Foulger v. Taylor, 367 Foulkes, Ex parte, 333 Founders v. Fitzgeorge, 158

Fowler v. Roberts, 247 v. Vail, 181

Fox v. Symington, 222, 368, 364

v. Toronto and Nipissing Ry. Co., 152, 176, 195 Foxall's Bail, 226

Fradenburgh v. Haskins, 214 France v. Campbell, 315

9 on, 61 76, 234 o, 45, 336, 378 & N. W. Ry. Co., 62, 393 384 292 1, 210 on (Local Bd.), ayor), 384 212, 361, 364 n, 119 0, 384 Cent. Ry. Co., 58 ldenda), **15**9 37 , 284 80 6 ner, 296 41, 371 18 ddenda), 75, 91 d, 125 ner, 323, 326 09 67

33 rge, 158 247 222, 363, 364 Nipissing Ry. 6, 195

kins, 214 315

France v. Dutton, 78, 318 Francis v. Brown, 341, 342 v. Dowdeswell, 223

v. Steward, 56 Frank v. Carson, 197, 198 v. Edwards, 29 Franklin v. Gream, 28

Fraser v. Burrowes, 217

v. Gore Dist. M. F. Ins. Co.,

v. North Oxford and West Zorra Plank Road Co.,

Fray v. Blackburn, 18 Frederici v. Vanderzee, 118, 323 Freehold Loan & S. Co. v. McLean. 210

Freeland v. Brown, 216 Freeman v. Cook, 274

v. Ontario and Quebec Ry. Co., 284 v. Read, 181, 386

v. Tranah, 175 Freeport (Borough) v. Marks, 59 French v. Lewis, 250 Freston, Re, 191

Frey v. Aultman, 338 v. Blackburn, 18, 60

v. Wellington M. Ins. Co., 24 Friel v. Ferguson, 383 Friend v. London, Chat. and Dover

Ry. Co. 192 Friendly v. Needler, 57 Fritz v. Hobson, 231 Frontenac (License Com'rs) v. Frontenac (County), 390

Fry v. Moore, 135 Fuggle v. Bland, 94 Fuller v. Alexander, 159

v. Cleveley, 231 v. Mackay, 111 v. Prentice, 189 v. Richmond, 92 Furber v. Cobb, 16 Furlong v. Reid, 230

Furness v. Booth, 96, 98 v. Mitchell, 397

Furnival v. Saunders, 75

G.

Gadsden v. Barrow, 358 Gage v. Collins, 362 Galbraith v. Fortune, 366, 367 Gallagher v. Bathie, 107 Gallant, Re, 384 Gallant v. Young, 59 Galliard v. Laxton, 380

Galligar v. Pavne, 255 Galloway v. Keyworth, 200 Galmoye v. Cowan, 249 Games, Ex parte, 317 Gardiner v. Juson, 308 v. Simmons, 231 Gardner v. Burgess, 95 v. Green, 156

Garland v. Omnium Securities Co., v. Thompson, 215

Garner v. Coleman, 18 Garrett v. Roberts 100, 165, 219, Garton v. G. W. Ry. Co., 108

Gates v. Smith, 298 Gault v. Murray, 93 Gay v. Matthews, 380, 384 Gayton v. Bayman, 384 Geddes v. Morley, 92 Gegg v. Adams, 108, 219 Gemmell v. Colton, 184 v. Garland, 378

Gendron v. McDougall, 230 General Horticultural Co., Re, 251,

Genge v. Freeman, 261 Gerrard v. Clowes, 277 Gerrie v. Chester, 225 Gesner, Re, 331 Gibbings v. Strong, 155 Gibbons v. Chadvick, 57, 63 v. Farwell, 294

Gibbs v. Cruickshank, 83, 245, 292 v. Guild, 180, 389 v. Southam, 29

Giblin v. McMullen, 348 Gibson v. McDonald, 20 v. People, 150 v. Wilson, 134

Gidley v. Palmerston (Lord), 250 Gilbert v. Gilbert, 103 Gilchrist, Ex parte. Re Armstrong, 899

v. Conger, 81 Gilding v. Eyre, 293 Giles v. Hemming, 181, 185 Gill v. Woodfin, 155 Gillespie v. Nickerson, 169 Gillett v. Rippon, 80 Gillies v. Wood, 81 Gilmer, Re, 295, 315 Gilmour v. Buck, 81, 84 Gilpin v. Rendle, 67 Ginn v. Scott, 55 Giraud v. Austen, 169

Girdlestone v. Brighton Aquarium Co., 212, 298

Grant, Ex parte, 30 Girvan v. Grepe, 159 v. Burke, 319 v. Aldrich, 128 Gladstone v. Padwick, 255, 294, 318 v. Anderson, 114, 137 Gladwell v. Blake, 379 v. Easton, 148 Glanville, Re. Ellis v. Johnson, 401 v. Grant, 397, 398 Glass v. Cameron, 296, 301 v. G. W. Ry. Co. 280 v. Holland, 118 Glascott v. Day, 173 Glasspoole v. Young, 43 v. McAlpine, 303 Gleason v. Williams, 191 v. McDonald, 180 Glover, Re, 77 v. McDonell, 251 v. Coles, 84 v. Peoples Loan & Deposit G. N. Ry. Co. v. Mossop, 167, 212, Co., 210 v. Shaw, 250, 267 224, 225 v. Young, 78 Goddard v. Hapgood, 250, 267 Godolphin v. Tudor 24 Grantham v. Bishop, 190 Godson v. City of Toronto, 55 Grass v. Allen, 57, 60, 62 Goff or Gough v. Mills or Miller, v. Austin, 359 189, 190 Grassett v. Carter, 218 Goggs v. Huntingtower, 130, 131 Gratham v. Powell, 182 Golding v. Bellnap, 86, 87 Gray v. Ingersoll, 27 Goodes v. Cluff, 219 v. McCarty, 339 Goodland v. Blewith, 171 v. Richford, 219 Goodman v. Boyes, 185 v. Webb, 179 v. Robinson, 259 v. Wilson, 286 Great Northern Committee v. Inett. v. Sayers, 11 Goold v. Rich (Addenda), 314 Gordon v. Jennings, 253 Great Western Ry. Co., Ex parte, v. O'Brien, Re, 103 v. Rumble, 366, 372 Greaves, In re, 24 v. Fleming, 175 Gorringe v. Terrewest, 134 Green, Re, 266 Gorslett v. Harris, 112 Goslin v. Tune, 360 v. Black, 110 Gosset v. Howard, 54 v. Brown, 357 Gouge's Bail, 226 v. Duckett, 349 Gough or Goff v. Miller or Mills, v. Humphries, 184 189, 190 v. Penzance, 266 Gould v. British Am. Ass. Co., 214 v. Ponton, 27 v. Close, 97 v. Hamilton Pro. Loan Co., v. Hope, 282, 315 147 v. White, 297 Government of Newfoundland v. v. Stevens, 359 Greene v. Harris, 97 Newfoundland Ry. Co., 97 v. Wood, 354 Gowanlock v. Mans, 147 Greenizen v. Burns, 59 Grace v. Walsh, In re, 103, 104 Greenough v. Eccles, 191 Graham v. Campbell, 93 Greenshields Doe d. v. Garrow, 295 v. Devlin, 324, 326 Greenwood v. Sutcliffe, 174 v. Furber, 296 Greer v. Hunter, 97 v. McArthur, 32 Gretton v. Mees, 174 v. Smart, 18, 54, 291 Greville v. Stultz, 196 v. Spettigue, 69 Grey, Re. Acason v. Greenwood, 399 v. Stewart, 198 Grieve v. Molson's Bank, 213 v. Tomlinson, 75, 76, 77, Griffin, Ex parte, 303 257 v. Coleman, 224

v. Dickenson, 169

v. Patterson, 396

v. Hodges, 174 v. Taylor, 384

Griffith v. Blake, 93

Grand Hotel Co. v. Cross, 71

Grand Junction Canal Co. v. Dimes,

Grand River Nav. Co. v. Wilkes,

28 114, 137 398 Co. 230 18 303 180 251 oan & Deposit 267 $\begin{array}{c}
 190 \\
 0,62
 \end{array}$ 18 182 9 9 mittee v. Inett. Co., Ex parte, , 175 49 s. 184 266 Pro. Loan Co.. 59

59 , 191 v. Garrow, 295 ffe, 174

34

v. Brown, 169 v. Curtain, 105 74 v. Gowanlock, 191 v. Goslee, 295

Griffiths v. Grantham (Municipal- | Hall v. Kennedy, 167 ity), 11 v. Ystradyfodwg (School Bd.), 175 Grill v. General Iron Screw Co., 198, 203, 204 Grimbley v. Aykroyd, 102, 103 Griswold v. Buffalo, Brantford & G. Ry. Co., 146, 250 Grogan v. London & M. Ins. Co., 111 Groom v. Rathbone, 159 to ve v. Young, 201 Grundy v. Townsend, 110, 111 Grymes v. Bowern, 294 G. T. R. Ry. Co. v. Credit Valley Ry. Co., 92 v. Ontario & Quebec Ry. Co., 224 Guess v. Perry, 131 Gunn v. Burgess, 296, 314 Gunther v. McTecr, 200 Gurney v. Atlantic, etc., Ry. Co., 353 v. Small, 161 Gutierrez, Ex parte. In re Gutierrez, Gutteridge v. Smith, 164

Guy v. G. T. Ry. Co., 36, 57, 92, 132, 137, 155, 260, 393 G. W. Ry. Co. v. Braid, 213 v. Chadwick, 84

v. Miller, 285 v. McEwan, 81 Gwynne v. Rees. 248

H.

Gyles v. Hall, 174

Haacke v. Marr, 81 v. Markham (Municipality), Hackett v. Bible, 361 Hadley v. Green, 4 Hagerty v. G. W. Ry. Co., 340 Haggart v. Kernahan, 80 Haggin v. Comptoir d'Escompte de Paris, 113 Hagle v. Dalrymple, 110 Haigh v. Sheffield, 124 Haines v. East India Co., 333 Haldan v. Beatty, 118, 362 Hales v. Stevenson, 185 Hall, Ex parte. In re Townsend, 297 v. Badden, 367

v. Kissock, 360 v. Pritchett, 247, 249 v. Scotson, 136 v. Thompson, 29 Hallack v. Cambridge, 58 Hallet v. Mears, 190 Hambridge v. De La Croué 3, 283 Hamer v. Giles, 252 Hamilton v. Bouek, 297 v. Brogden, 95 v. Cousineau, 852 v. Dennis, 2 v. Massie, 43 Hamilton P. & L. Co. v. Campbell, Hamilton P. & L. Socy. v. McKim, 256 Hamlyn v. Betteley, 36, 55, 221, 232, 234 Hammerton v. Honey, 71 v. Harrison, 359 Hammond v. McLav. 81 v. Schofield, 4, 140 v. Stewart, 190 Hampden v. Walsh, 66 Hancock v. Smith, 252 Hand v. Hall, 365 Handley v. Franchi, 839 v. Upper Canada Furniture Co., 202 Hands v. Clements, 119 Hanna v. McKenzie, 297 Hannagan v. Burgess, 85 Hanns v. Johnston, 156, 347, 384, 385 Hansard v. Lethbridge, 31, 349 Hansen v. Maddox, 361 Hanvey v. Stanton, 250 Harding v. Barrett, 267

v. Davies, 173 v. Knust, 191 v. Wre 1, Re, 284, 286 Hardy v. Pickard, 231 v. Ryle, 384 Hare v. Milne, Re, 285 Hargrave v. Spink, 83

Hargreaves v. Hayes, 62 v. Meyers, 87, 107, 108 v. Scott, 38 Harmer v. Cornelius, 101

v. Cowan, 361 Harper v. Davis, 177 v. Phillips, 180 v. Scrimegeour, 327 v. Young, 68 Harpman v. Child, 256

Harrington v. Edison, 11, 228

Harrington v. McMorris, 261 Heenan v. Dewar, 92 v. Rainsay, 58 Hefford v. Alger, 87 Harris v. Amery, 113 Heineman v. Hale, 137, 145 v. Andrews, 161 Heintzman v. Graham, 213 v. Gamble, 96, 98 Helev v. Couisins, 86, 87 v. Harper, 248 v. Jenns, 67 v. Slater, 329, 330 Harrison, Re, 155, 221 v. Barry, 365 v. Bottenheim, 139 v. Douglas, 177 v. Good, 124 v. Harrison, 141, 295, 394, 399 v. Paynter, 315 v. Smith, 148 v. Wright, 57 Harvey v. Croyden Union Rural Sanitary Authority, 155, 169 v. McNeil, 302 Hart v. Denny, 177 v. Revnolds, 298, 366 v, Ruttan, 151, 208, 339 Hartland v. General Exch. Bank, Haskins v. St. Louis & S. E. Ry. Co., 11, 228 Hastelow v. Jackson, 66 Hastings, Re Lady. Hallett v. Hastings, 400 Hatfield's Bail, 226 Hatton v. Fish, 212 v. Haywood, 255 Hausberg v. People, 66 Hawke v. Brear, 284, 290 Hawkins, Ex parte, 281 In re, 19 v. Gethercole, 252 v. Rutter, 70 Hawley v. North Staffordshire Ry. Co., 11 Haworth v. Fletcher, 227 Hay v. Hunt, doe, 197 Haydon v. Crawford, 295, 359 Hayes v. Keene, 330 Hayley v. Grant, 168 Hayman v. Governor's of Rugby School, 19 Hays v. Armstrong, 156 Haythorn v. Bush, 358 Hayward v. Hague, 174 Hazlett v. Hall, 294 Heaman v. Seale, 162 Heath v. Long, 111 v. White, 131

Hedley v. Closter, 86

Helmore v. Smith, 141, 295 Help v. Lucas, 108 Heming v. Wilton, 4 Hemming v. Blanton, 220 v. Williams, 220 Henchett v. Kimpson, 365, 366 Henderson v. Brown, 97 v. Dickson, 313 v. Henderson, 147 v. Preston, 333 v. Sills, 80 v. Squire, 245 Henly v. Lyme (Mayor), 257 Hennell v. Davies, 177 Henney v. Scott, In re, 55 Henricks v. Henricks, 102 Henry v. Armitage, 27 v. Cook, 82 Hepburn v. Patton, 92 Herbert v. Park, 231 Hermann v. Seneschal, 383 Hermitage v. Kilpin, 332 Hernaman v. Smith, 110 Herr v. Douglass, 120 Herring v. Wilson, 349 Herchfeld v. Clarke, 119, 823 Hesketh v. Fawcett, 171 Hesketh v. Flemming, 135 Hesse v. Buffalo, B. & G. Ry. Co Hessin v. Coppin, 93 Hewat v. Davenport, 251 Heyland v. Scott, 198 Heymann, Ex parte, 371 Heyworth v. London (Mayor), 5 Hibbitt v. Schilbroth, 58, 135 Hicks, In re, 328 Hicks v. Faulkner, 352 Higginbotham v. Moore, In re, 10 846 Higgins v. Barton, 83 v. Brady, 337, 339 v. Sargent, 209 v. Willes, 286 Higham v. Braddely, 174 v. Ridgeway, 407 Hill, Ex parte, 128, 135 Hill, Re, 58 and Hymans, Ex parte, 265 v. Managers of Met. Asylu

Dist. 59, 291

Dewar, 92 Alger, 87 v. Hale, 137, 145 n v. Graham, 213 ouisins, 86, 87 . Smith, 141, 295 ucas, 108 . Wilton, 4 v. Blanton, 220 v. Williams, 220 v. Kimpson, 365, 366 n v. Brown, 97 v. Dickson, 313 v. Henderson, 147 v. Preston, 333 v. Sills, 80 v. Squire, 245 Lyme (Mayor), 257 . Davies, 177 . Scott, In re, 55 v. Henricks, 102 Armitage, 27 Cook, 82 v. Patton, 92 7. Park, 231 v. Seneschal, 383 ge v. Kilpin, 332 n v.Smith, 110 Douglass, 120 v. Wilson, 349 1 v. Clarke, 119, 523 v. Fawcett, 171 v. Flemming, 135 Buffalo, B. & G. Ry. Co.,

Davenport, 251 v. Scott, 198 1, Ex parte, 371 v. London (Mayor), 57, . Schilbroth, 58, 135

Coppin, 93

re, 328 Faulkner, 352 tham v. Moore, In re, 105

. Barton, 83 . Brady, 337, 339 . Sargent, 209 . Willes, 286 v. Braddely, 174 v. Ridgeway, 407 parte, 128, 135 Hymans, Ex parte, 265 ox, 68

anagers of Met. Asylum

Dist. 59, 291

Hill v. South Staffordshire Ry. Co., | Hooper v. Keay, 67 209, 210 Hilliard v. Smith, 135

Hills v. Mesnard, 277 v. Renny, 363 Hillyard v. Royal Ins. Co., Re, 286

Hincks v. Sowerby, 318 Hind v. Brett, 18 Hindlay v. Haslam, 97 Hindle v. Blades, 87 Hirsch v. Coates, 251 Hitchman v. Stewart, 209

Hoare v. Niblett, 4, 396 Hobbs v. Midland Ry. Co., 124 v. Scott, 326

Hobern v. Fowler, 191 Hobson v. Thelluson, 28, 245, 376 Hobson, Re. Webster v. Rickards,

Hodge v. The Queen, 24, 391 Hodges v. Cobb, 198 Hodgson v. Gascoigne, 365

v. Graham, 59 v. May, 119 v. Lynch, 28 v. Towning, 331 v. Williamson, 400

Hodsoll v. Baxter, 4, 147 Hoey v. McFarlane, 17, 19, 20, 24 Hogan v. Sterrett, 254

Hogg v. Brooks, 156 Holbird v. Anderson, 279 Holden v. Langley, 364 Holland v. Phillips, 174

Hollingshead, Re. Hollingshead v. Webster, 186

Holm v. Booth, 226

Holme v. Guy, 18 Holmes v. C. P. Ry. Co., 198, 200

v. Millage (Addenda), 94 v. Reeve, 107

v. Russell, 131 v. Service, 135

Holt, In re, 189 v. Collyer, 67

v. Frost, 358 v. Jarvis, 13

Holtby v. Hodgson, 18, 248, 395, 400, 401

Holton v. Guntrip, 358 Home, Ex parte. Re Home, 400 v. Camden, 60, 78

Hong Kong & Shanghai Banking Co. v. Java Agency Co., 161 Honsinger v. Love, 141

Hood v. Cronkite, 208, 338 Hooke v. Ind, Coope & Co., 859 Hooper v. Christoe, 167

Hoover v. Craig, 85, 304

v. Zavitz, 87 Hoorigan v. Driscoll, 81, 84 Hoperaft v. Hickman, 286

Hope v. Evered, 352 v. Graves, 312

v. Hope, 200 Hopkins v. Abbott, 316 v. Hopkins, 400

v. Ware, 277 Hopper, Re. 284

Hopper v. Warbunton, 59 Hopton v. Robertson, 148, 161 Hornick v. Romney (Tp.), 38, 191 Horner v. Kerr, 395, 397, 398

Horton, Re, 22 Hoskins v. Knight, 366 Hough v. Edwards, 252

Houghton v. Howarth, 134 Houlden v. Smith, 17, 18, 54 House v. House, 183, 186

Household F. Ins. Co. v. Grant, 24

Howard, In re, 119 v. Clark, 352 Howe v. Smith, 96

Howell v. Metrop. Dist. Ry. Co., 247, 249

Howell v. Listowel Rink Co., 88, 173 Howes v. Barber, 152, 176, 190

Howkins v. Baldwin, 196 Howland v. Rowe, 339 Howlett v. Tarte, 4

Howlley v. Young, Re, 64 Hoye v. Bush, 379

Hubbard v. Goodley, 75 Hudon Cotton Co. v. Canada Shipping Co., 171

Hudson v. MacRae, 68 v. Tooth, 118, 129 Huff v. Cameron, 288

Huffer v. Allen, 252 Hughes v. Buckland, 383

v. Can. P. L. & S. Socy., 102 v. Field, 169

v. Griffiths, 118

v. Stirling, 225 v. Towers, 367

Hughson v. Gordon, 159 Holme v. Tenant, 395, 402 Hume v. Peploe, 171 Hunt v. Blaquiere, 226

Hunt v. Hunt, 395

v. Round, 88 v. Great Northern Ry. Co., 70

v. North Staffordshire Ry. Co., 71

Hunter v. Caldwell, 312

Hunter v. Greensill, 248, 249

v. G. T. Ry. Co., 108 Huntsworth, Re, 69

Hurrell v. Wink, 81 Hurst v. Sheldon, 357

Huskinson v. Lawrence, 83 Hutchings to Burt, Re. 899

v Nunes, 309 Hutchinson v. Gillespie, 148

v. M. B. & R. Ry. Co.,

Hutson v. Valliers, 75, 222 Hutt v. Gilleland, 87

v. Keith, 87

Huttman v. Boulnois, 100 . Hutton v. Federal Bank, 211

v. Fowke, 59

I.

I. v. K., 94 Ibbottson v. Henry, 85, 383, 384

Ibotson v. Phelps, 156 Ide, Ex parte. Re Ide, 145 Imperial Bank v. Dickey, 323

Imperial Gas Co. v. London Gas Co., 180 Indigo Co. v. Ogilvy, 144

Inglis v. Wellington Hotel Co., 147, 210

Ingram v. Barnes, 253

v. Little, 217 v. Taylor, 359

Ings v. Lond. & S. W. Ry. Co., 179 Innes v. East India Co., 249

Insley v. Jones, 59, 75, 130 International Wrecking Co. v. Lobb, 230

Ireland v. Pitcher, 73 Irvine, Re, 247

Irving v. Askew. 5, 208, 220, 224, 391

v. Morrison, 97

v. Veitch, 186 v. Wilson, 384

Irwin v. Freeman, 185

Isaac, Re, 402

Isreal v. Benjamin, 177 Ives v. Ives, 181

Ivory v. Cruickshank, 91

J.

Jackson v. Barry, Ry. Co., 285

v. Beaumont, 58, 110

v. Cassidy, 250

v. Copeland, 59

Jackson v. Everett, 4

v. Grimley, 111

v. Jacob, 173 v. Litchfield, 144

v. Wooley, 186

Jacobs, Re, 326

v. Humphrey, 319 Jacomb v. Henry, 139, 312

v. Turner, 61

James v. Barrand, 394

v. James, 285

v. Newton, 128

v. S. W. Ry. Co. 58, 343

v. Vane, 179

Jameson's Bail, 226

v. Jones, 203

v. Kerr. 82

Jamieson v. Wilkins, 134 Jay v. Johnstone, 181

v. Robinson, 400, 401

Jeff Davis, The, 252

Jeffery v. Bastard, 87 Jeffs v. Day, 316

Jenkins v. Cook, 23

v. Kerby, 5

v. Miller, 61, 75

v. Morris, 213

Jenkyns v. Brown, 172

v. Gaisford, 77

Jennings v. G. T. Ry. Co., 381

v. Willis, 128, 277 Jephson v. Greenaway, 201

Jervis v. Peel, 248

Jewell v. Hill, 212 Johnson, Ex parte, 292

Re, 44, 370 v. Credit Lyonnaise Co.,

126, 274 v. Crook, 255

v. DeVeber, 131

v. Diamond, 245, 246, 247, 249

v. Disney, 134

v. Evans, 141 v. Gallagher, 397

v, Hogg, 294 v. Lakeman, 216

v. Leigh, 331

v. Moody, 252 v. McKenna, 293

v. Parke, 86, 87

v. Provincial Ins. Co., 163 v. Smallwood, 135

v. Therrien, Re, 63, 64, 266, 270, 273

v, Wardle, 167

Johnstone v. Browne, 402

Jolliffe v. Wallasey Local Bd., 384

y, 111 eld, 144 , 186 rey, 319 139, 312 , 61 , 394 285, 128 Ry. Co. 58, 343 7926 s, 203 r, 82 ins, 134 181 400, 401 52 a, 87 23 , 5 , 61, 75 s, 213 n, 172 ord, 77. Ry. Co., 381 is, 128, 277 naway, 201 $\mathbf{2}$ e, 292 370 it Lyonnaise Co., 274 k, 255 eber, 131 nond, 245, 246, 247, ey, 134 ns, 141 agher, 397 g, 294 eman, 216 h, 331 dy, 252 lenna, 293

se, 86, 87 incial Ins. Co., 163 llwood, 135 rrien, *Re*, 63, 64, 270, 273 cdle, 167 owne, 402 sey Local Bd., 384

Jonas v. Adams, 230 Jones, In re, 132, 220 In re. Ex parte Kelly, 252, In re. Ex parte Lloyd, 253 v. Brown, 183, 250 v. Cook, 84 v. Currie, 71 v. Gibbons, 79 v. Gooday, 386 v. Grace, 385, 393 v. Harris, 107, 396 v. James, Re, 56 v. Jones, 208 v. Macdonald, 31, 226, 349 v. Owen, 56, 125 v. Parcell, 222 v. Paxton, 308, 310 v. Scottish Accidental Ins. Co., 112 v. Thompson, 146, 247, 248, 249, 336 v. Tobin, 200 v. Tuck, 219 dem, Griffiths v. Marsh, 156 (Trustees) v. Gittens, 59 Jordan, Re. Kino y. Pickard, 399 v. Marr, 55, 59 v. Jones, 164 Joselyn, Ex parte. Re Watt, 261, 281 Joseph v. Henry, 61 v. Miller, 66 Joule v. Taylor, 384 J. R. v. North Curry, 111 Judge of Elgin, Re, 64 Niagara District, In re, 19, 108 Northumberland and Durham, Re, 56, 105 Division Court Toronto, Re, 370 Julius v. Oxford (Bishop), 254, 255,

Κ.

Kalar v. Cornwall, 380 Kavanagh v. Kingston (Corp.), 147 Kay v. Marshali, 219 Keane v. Steadman, 362 Kearsley v. Cole, 27 Keena v. O'Hara, 218, 308 Keenahan & Preston, In re, 224 Kehoe v. Brown, 813 Keighley, Maxstead & Co. v. Bryan, Durrant & Co., 284, 287

D.C.A.-0

Jupp v. Powell, 184

Kaitling v. Parkin, 82

Keightley v. Birch, 319 Kelly v. Ottawa St. Ry. Co. 231 v. Isolated Risk F. F. Ins. Co., v. Wade, 120 Kemble v. Farren, 96 v. McGarry, 385 Kemp, Ex parte, 245 v. King, 191 v. Neville, 18 v. Owen, 110 Kempson, Ex parte, 228 Kempton v. Willey, 56 Kendall v. Hamilton, 4, 140, 143, 246Kennedy v. Hale, 384 v. Patterson, 299 v. Purcell, 148 Kennett v. Westminster Improvement Com'rs., 250 Kenney v. May, 344 Kennin v. Macdonald, 87, 354 Kennington, Ex parte, 220 Kenny v. Hutchinson, 120 Kent v. Jones, 156 v. Kent, 397 v. Tomkinson, 262 Kenyon v. Eastwood, 152, 324, 370 Kepp v. Wiggett, 27 Ker, In re, 65 Kerby v. Cahill, 83 Kerkin v. Kerkin, 58 Kernot v. Bailey, 64 Kero v. Powell, 28, 304 Kerr v. Cornell, 108 v. G. T. Ry. Co., 168 v. Haynes, 112 v. Kinsey, 298 Kersterman v. McLellan, 337 Keyser v. Mitchell, 252 Kidd v. O'Connor, 327 v. Perry, 196, 200 v. Walker, 177 Kiely v. Massey, 155 Killens v. Street, 132 Kimberley v. Alleyne, 135 Kimbray v. Draper, 392 Kimpton v. Willey, 103 Kincaid v. Kincaid, 94 v. Reid, 94, 95 King v. Burrell, 239 v. England, 320 v. Farrell, 110 v. Hoare, 3, 140, 246 v. Macdonald, 298, 342 v. Norman, 27

v. Simmonds, 169

King's College v. McDougall, 184

Kingsford v. Merry, 83 Kingsley v. Dunn, 158 Kingsmill v. Millard, 115 Kingston Election, In re. Stewart v. Macdonald, 290 Kingston (City) v. Brown, 132 v Shaw. 366 Kingstown Commissioners, Exparte, 55 Kinnaird v. Webster, 67 Kinning, Ex parte, 328 v. Buchanan, 328 Kinnear v. Blue, 137 Kinsey v. Roche, 76 Kirk v. Burgess, 94 Kirkendall v. Thomas, 87 Kirkpatrick, Re. Kirkpatrick v. Stevenson, 182, 209 Kirton v. Braithwaite, 171, 172 Kitchen v. Murray, 214 v. Shaw, 216 v. Wilson, 134 Klein v. Klein, 212 Knight, Re, 69

In re. Knight v. Gardiner,

v. Egerton, 245, 317
v. Lee (Addenda), 65
v. Medora (Tp.), Re, 36, 69, 107, 257

Knox v. Gye, 182 v. Porter, 168 Kormann v. Tookey, 38 Kraemer v. Gless, 336 Kraus v. Arnold, 173 Krehl v. Great Central Gas Co., 296 Kyle v. Barnes, 337

Knowles v. Holden, 56, 57

L.

La Banque Jacques Cartier v. La
Banque D'Epargne, etc., 126
La Banque Jacques Cartier v.
Strachan, 128
Labatt v. Chisholm, 63, 306, 318
Labouchere v. Wharncliffe, 15
Ladouceur v. Salter, 42, 111, 131
Laird v. Briggs, 355
Lake v. Biggar, 81
Lambe, Ex parte, 16
Lambert's Estate, Re. Stanton v.
Lambert, 397
Lamley v. East Retford (Mayor), 385
Lamond v. Eiffe, 337
Lamont v. Crook, 190
v. Southall, 384

Lampman v. Davis, 184 Landman v. Crooles, 209 Lane, In re. Ex parte, Gaze, 187 v. Capsey, 95 v. Glenny, 187 v. Isaacs, 149 Langen v. Tate, 196, 200 Langford v. Kirkpatrick, 385 Lannan v. Audley, 175 La Pointe v. G. T. R. Co. 31 Laughton v. Thompson, 92 Law v. Redditch (Local Bd.), 98 v. Thompson, 180 Lawford v. Partridge, 59, 70, 290 Lawless v. Radford, 85 v. Sullivan, 49 Lawrence v. Willcocks, 210 Lawrenson v. Hill, 830 Law Society v. Macdougall, 22 v. Waterlow, 22 Lawson v. Hutchinson, 285 v. Laidlaw, 27, 395, 398 v. Vacuum Brake Co., 196 Lea v. Charmington, 352 v. Facey, 383 v. Parker, 253, 328 Leah v. Order of Chosen Friends, 30 Leak v. Driffield, 396 Leaming v. Woon, 250 Leath v. Vine, 68 Leatherdale v. Sweepstone, 173 Le Blanch v. Wilson, 30 Lecky v. McDermott, 83 Lee v. Bude Ry. Co., 5 v. Dangar, 394, 373 v. Howes, 295 v. Hopkins, 395 v. Morrow, 812, 343 v. Parker, 328 v. Rapelje, 141 v. Wilmot, 183 Lees, Ex parte, & C. C. Judge of Carleton, 238, 369 v. Carleton (County), 8, 9 Leete v. Hart, 383

Legarie v. Canada Loan and Bank-

ing Co., 75, 78, 147, 245 Leibes v. Ward, 20

Lemay v. McRae, 284, 285 Lemoine, doe, v. Raymond, 197

Lemon v. Lemon, 326 v. Summers, 400

Leslie v. Emmons, 19 Le Taileur v. S. E. Ry. Co., 113

Levasseur v. Mason, 95

Levy v. Champneys, 358

v. Morden, 371

Lett v. Morris, 128

Cross, 92

, 184 es, 209 te, Gaze, 187 87 6, 200 atrick, 385 175 R. Co. 31 ipson, 92 Local Bd.), 98 , 180 dge, 59, 70, 290 d, 85 n, 49 cocks, 210 1, 330 acdougall, 22 aterlow, 22 inson, 285 w, 27, 395, 398 m Brake Co., 196 on, 352 3, 328 Chosen Friends, 30 396 ı, 250 weepstone, 173 lson, 30 nott, 83 Co., 5 94, 373 5 395 12, 343 28 41 88 & C. C. Judge of on, 238, 369 n (County), 8, 9 33 da Loan and Bank-78, 147, 245 20 e, 284, 285 Raymond, 197

n, 326

128

ners, 400

ason, 95

, 371

neys, 358

ons, 19 . E. Ry. Co., 113

London & Blackwell Ry. Co. v. Levy v. Wilson, 148 Levy's Bail, 226 Lewis v. Blurton, 156 v. Calor, 118 v. Graham, 113 v. Holding, 862 v. Old, 58, 284, 240 v. Teale, 80, 84, 884 v. Thompson, 226 Lexden v. Southgate, 60 Leys v. McPherson, 898 Life and Fire Ins. Co. v. Wilson, Liffin v. Pitcher, 122 Light v. Anticosti, 200 v. Lyons, 103 Liley v. Harvey, 69 Lilley v. Elwin, 100, 101 Lilly v. Smales, 78 Linden v. Buchanan, In re, 87, 64, 120, 224, 301 Lindus v. Bradwell, 170 Lindsell v. Phillips, 181 Linsell v. Bonsor, 185, 186 Lintott, Ex parte, 210 Lipscombe v. Holmes, 177 Liquor License Act, 1883, Re, 24 Lisburne (Earl) v. Davies, 115 Lister, In re, 65 v. Perryman, 351 v. Stubbs, 101 v. Wood, 212 Liverpool Gas Light Co. v. Everton (Overseers), 61 Livingstone v. Gartshore, 214 Lizars v. Dawson, 181 Llado v. Morgan, 173 L. Lime Co. v. Baker, 112 Lloyd v. Henderson, 201 v. Jones, 68, 70 v. Key, 195 v. Maund, 185 v. Walker, 177 v. Wallace, 218, 249 Re. Allen v. Lloyd, 95 Lloyd's Banking Co. v. Ogle, 155, 159 Lockart v. Gray, 247, 315, 366, 367 Locke v. McConkey, 366 Lockridge v. Lacey, 173, 174 Lockwood v. Bew, 197 Lodge v. Thompson, 198 Logue v. McCuish, 66 Lomax v. Berry, 291 London Chartered Bank of Australia v. Lempriere, 397 London Discount Alliance Co. v Luxon, Exparte, 118 Kerr, 395

London & Canadian L. & A. Co. v. Morphy, 141 London & Canadian L. & A. Co. v. Meritt, 95 London (Mayor) v. Cox, 55, 56, 57, 58, 60, 61, 63, 261, 269, 379 London & N. W. Ry. Co. v. Grace, 228 London & N. W. Ry. Co. v. Lindsay, London & N. W. Ry. Co. v. Whinray, 29 London, Chatham & Dover Ry. Co. v. S. E. Ry. Co., 147, 209 London & Suburban Land Co. v. Field, 67 London & S. W. Ry. Co. v. Blackmore, 123 London Universal Bank v. Clancarty, 210 Long, Inre. Ex parte Cuddeford, 47, 311 v. Long, 173 Longford, The, 384 Long Point Co. v. Anderson, 60, 61, Longuêuil v. Cushman, 214 Lord v. Hall, 170 Lord Wellesley's Case, 191 Lossing v. Jennings, 299, 366 Lough v. Coleman, 383
Louis, Re. Ex parte Incorporated
Law Society (Addenda), 22
Love v. Culham, 87 Lovegrove v. White, 170 Lovell v. Newton, 49 v. Wardroper, 362 Lovely v. White, 266 Low v. Blackmore, 261 Lowden v. Martin, 159 Lowe v. Fox, 16 v. Owen, 256 Lowis v. Rumney, 187 Lowson v. Canada Farmer's M. Ins. Co., 296 Lowter v. Radnor, CO Lucas v. Dickson, 77 v. Elliott, 75 v. Harris, 91, 249 y. Ross, 148 v. Tarleton, 382 Lumb v. Teal, 221 Lumley.v. Gye, 196 v. Wagner, 92 Lydall v. Martinson, 168

Lyell v, Kennedy, 192 Lyman v. Brethron, 119 v. Sheriff, 86 Lynch v. O'Hara, 32 v. Wilson, 216 Lyon v. Tiffany, 183 v. Tomkies, 317 v. Weldon. 344 Lyons v. Golding, 380 Lyster v. Boulton, 99

Μ. Maber v. Maber, 186 Macara v. Dines, 68, 69 v. Morrish, 69 Macaulay v. Rumball, 251 Macbeth v. Ashley, 255 Macbeath v. Haldimand, 250 Macdonald, Re. 141 v. Anderson, 94, 249 v. Crombie, 277, 296 v. Macdonald, 111 v. Tacquah Gold Mining Co., 251 Worthington, 168, 213 Macdonell v. Baird, 284 v. Blake, 391 Macdougall v. Knight, 219 v. Paterson, 111, 152, 161, 241 Macfie v. Hutchinson, 60, 253 v. Hunter, 296, 359, 364 v. Pearson, 347 Macgregor v. Galsworthy, 385 Mack v. Ward, 248, 249 Mackinley v. McGregor, 82 Mackonochie v. Lord Penzance, 63 Maclean v. Anthony, 359 Maclure, Ex parte, 101 Macnee v. Ontario Bank, 394 Macrae v. Clarke, 245, 876 Maddison v. Alderson, 102 Maddocks v. Holmes, 149, 180 Magrath v. Todd, 312, 343 Magurn v. Magurn, 4 Mahon v. Inkster, 220, 225 Malcolm v. Leys (Addenda), 75 v. Malcolm, 114 Malcolmson v. Hamilton P. & L. Socy, 213 Manby v. Manby, 182 Manchester S. & L. Ry. Co. v. Brooks, 96 Mandeville v. Welch, 128

Manning v. Ashall, 219

Manning v. Lunn, 174 Moriarty, 155 Manoque v. Mason, 160 Manson v. Gurnett, 80 Manufacturers & Mer. M. Ins. Co. v. Campbell, 77, 257 Margate Pier Co. v. Hannap, 18, 20 Marples v. Hartley, 247 Marquis of Salisbury v. Ray, 47, 311 Marriott v. Hampton, 4 Marsden v. Wardle, 57, 62, 69 Marsh v. Conquest, 112 v. Dews, 68 Marshall v. Jamieson, 78, 79 v. Lamb, 13 v. McRae, 36 v. Poole, 209 v. Whitesic 2, 177 Marston v. Allen, 111 Marter and Gravenhurst, In re. 64 Martin, Ex parte, 90 v. Andrews, 189 v. Bannister, 90, 160, 201, 871 v. Corbett, 214 v. Hendrickson, 382 v. McCharles, 119, 169 Martins v. Upcher, 385, 386 Mason v. Farnell, 126 v. Johnson, 82 v. Kensington Vestry, 885 v. Mogridge, 145 v. Morgan, 108, 359 v. Muggeridge, 260 v. Wirrall Highway Bd., 217 Massey v. Burton, 112 v. Sladen, 371 Massie v. Toronto Ptg. Co., 214, 247, 249 Massy v. Rowen, 397 Matheson v. Kelly, 172, 173 Matthewman's Case, 396 Matthews v. Munster, 170 Maund v. Monmouthshire Canal-Co., 381 Maunsell v. Ainsworth, 189 Maw v. Jones, 100, 101 v. Ulyatt, 216 Maxwell v. Scarfe, 16 May v. Standard Fire Ins. Co., 294 Mayer v. Burgess, 375 v. Farmer, 220 Mayhew v. Herrick, 245 Mayor of Durham v. Fowler, 29 Mayor of London v. Cox, 55, 56, 57, 58, 60, 61, 63, 261, 269, 379 Mayor of London v. London Joint Stock Bank, 263

Miller v. Salomons, 194

74 155 160 0 er. M. Ins. Co. , 257 Hannar, 18, 20 247 y v. Ray, 47, 811 n, 4 57, 62, 69 112 on, 78, 79 13 86 US ić 2, 177 11 nurst, In re, 64 8, 189 er, 90, 160, 201, 214 kson, 382 les, 119, 169 385, 886 26 82 on Vestry, 385 , 145 108, 359 lge, 260 lighway Bd., 217 112 371 etg. Co., 214, 247, 97 172, 173 se, 396 ter, 170 outhshire Canal orth, 189 , 101 6 16 Fire Ins. Co., 294 375 220 k, 245 v. Fowler, 29 v. Cox, 55, 56, 57, 261, 269, 379 v. London Joint

63

Mead v. Creary, 36, 188, 249, 257 v. Tiffany, 296 Medwin, Ex parte, 19, 59 v. Tunis, 81, 32 Miller's Tanning Extract (o. v. Meek v. Scobell, 58 Mein v. Hall, 298 Mellisch v. Lloyds, 215 Mellish v. Buffalo, B. & G. Ry. Co., Horton, 86 Millet v. Coleman, 54 Milligan v. G. T. Ry. Co., 197 Mills v. Welbank, 196 Meloche v. Reaume, 45, 86, 87 Melville Mut. M. & F. Ins. Co. v. Driscoll, 198 v. Mills, 199 Milner, Ex parte, 64 Milltown v. Boardman, 874 Meneilly v. McKenzie, 298 Mercer v. Graves, 252, 303 Milson v. Day, 189 Minet v. Morgan, 192 Minor v. L. & N. W. Ry. Co., 113 Merchants' Bank v. Bell, 400, 402 v. Herson, 233, Miron v. McCabe, 62, 63, 105 361, 364 Mitchell v. Foster, 118 v. Lucas, 77, 214 v. G. W. Ry. Co., 286 v. Van Allen, 36, 57, 98, 132 v. Hender, 113 v. Lee, 247 Merchants' Express Co. v. Morton, v. Mulholland, 212 Merchants' Shipping Co. v. Armiv. Scribner, 64, 889, 852 tage, 209 Mittleberger v. Merritt, 68, 64 Meredith v. Whithingham, 60 Moffatt v. Carleton Place Board of Mersey Docks Board v. Lucas, 49 Education, 114 . Metrop. Bd. of Works v. Steed, 160 v. Parsons, 172 Metrop. Loan & Sav. Co. v. Mara, v. Prentice, 200 322, 394 Mogul Co. v. McGregor, 41 Metrop. Ry. Co. v. Wright, 163, 213 Molony v. Cruise, 248 Meyer v. Bell, 72 Molsons Bank v. Dillabaugh, 120, Meyers v. Baker, 86, 87 150v. Maybee, 86 v. McMeekin, 212, v. Wonnacott, In re, 11, 343 297, 810 Meyerstein v. Barber, 84 Monks v. Jackson, 818 Michie v. Reynolds, 209, 300 Montagu v. Harrison, 190 Middlefield v. Gould, 33, 37 Middlesex v. Smallman, 27 Middleton v. Brewer, 171 Monteflore v. Lloyd, 28 Montreal Ass. Co. v. McCormick, v. Pollock, 152 Moody v. Canadian Bank of Com-Midland Banking Co. v. Chambers, merce, 303 219 v. Tyrrell, 172, 172 Midland Ry. Co. v. Withington Moone v. Rose, 332 Moor v. Roberts, 175 Local Bd., 383 Mildmay v. Methuen, 210 Moore v. Denn, 70 Miles v. Roe, 238, 329 v. Gamgee, 56 Millar v. Nolan, 358 v. Gidley, 839, 843, 885 Millard v. Baddeley, 159 v. Gurney, 214 Miller, Re, 400 v. Hicks, 214 v. Beaver M. F. Ins. Ass., v. Jackson, 394, 395, 397 v. Knight, 187 v. Caldwell, 184 v. Wallace, 61, 279, 281, 341 v. Confederation Life Ass. Moot v. Gibson, 94 Co., 214 Moran v. Palmer, 384 v. Corbett, 29 Moreton v. Holt, 293 v. Dell, 181 Morgan, Ex parte. In re Simpson, v. Huddlestone, 217 234 v. Mann, 124 v. Davies, 165 v. Miller, 182 v. Eyre, 322, 402 v. Mynn, 247 v. Hughes, 339

Morgan v. Mather, 16 v. Palmer, 383, 384 v. Rowlands, 185, 186 v. Thomas, 354 Morley v. Bank of B. N. A., 120 Morphett, In re, 11 Morphy, Re. Morphy v. Niven, 95 Morrell v. Cowan, 27 v. Frith, 184, 185 Morris v. Cameron, 75 v. Coles, 131, 135 Morton v. Palmer, 254 Moses v. Moses, 76 Moss, Ex parte, 128 Möstyn v. West Mostyn Coal & Iron Co., 97 Mouflet v. Cole, 114, 265 Mountcashell v. O'Neill, 378 Mountroy v. Collier, 69 Mowatt v. Londesborough, 210 Moxham, The, 196 v. Day, 83 Moxon v. London Tramways Co., 60, 212, 213 Muckle v. Ludlow, 198 Muckleston v. Smith, 358, 361 Mullane u. Ahern, 94 Mullett v. Hunt, 189 Mulligan v. White, 198 Mulvaney v. Hopkins, 86 Mulvihill v. Lachance, 225 Mumford v. Hitchcocks, 118 Mungean v. Wheatley, 84, 107 Munsie v. McKinley, 70, 283, 279 Munster v. Cox, 144, 284 v. Lamb, 18 Murphay v. Guardians Benmullet Union, 248 Murphy v. Green, 247 Murphy v. Nolan, 156 Murray v. Black, 79 v. Earl of Stair, 278 v. G. W. Ry. Co., 156 v. Simpson, 247 Murtagh v. Barry, 213 Muskoka and Gravenhurst, Re, 59 Myerhoff v. Froelich, 182 Myers v. Baker, 107 v. Defries, 188, 290 Myles v. Burton, 396, 397 v. Thompson, 78 Mc.

McAllister v. Bishop of Rochester, 217 v. Cushing, 231 McArthur v. Cool, 28, 29, 360

Co., 177 McCann v. Waterloo F. M. Ins. Co., 175 McCargar v. McKinnon, 49 McClevertie v. Massie, 299 McClive, Re, 210 McColl v. Waddell, 219, 220 McCombie v. Anton, 202 McConnell v. Wilkins, 215 McCormack v. Berzey, 184 v. Park, 251 McCorquodale v. Bell, 192 McCracken v. Creswick, 76 McCraney v. McLeod, 250 McCrea v. Waterloo M. F. Ins. Co., 24, 175, 215, 350 McCullis v. Allen, 83 McCullough v. Sykes, 5 McDermid v. McDermid, 75, 76 McDermott v. Ireson, 214 McDonagh v. Jephson, 295, 302 McDonald, Re, 30 v. Burton, 148 v. Cameron, 318 v. Cieland, 151, 208, 293 v. Elliott, 181 v. Field, 170 v. Forrestal, 82 v. Hollister, 249 y. Lane, 84 v. McDonald, 316 McDougall v. Robertson, 285 v. Waddell, 294, 296 McDowell v. McDowell, 233, 294, 315, 361 McEdward v. Ogilvie Milling Co., McElheran v. London Masonic Ben. Ass., 80, 282 McFee, Ex parte, 58 McGarry v. White, 402 McGee v. Baines, 358 v. Baird, 212 McGill v. McLean, 149 v. Walton, 352 McGivern v. McCausland, 298 McGlinchy v. Winchell, 250 McGowan v. Middleton, 97

McGrath v. Cox, 212

McArthur v. Southwold, 232

McCallum and School Sec. 6, Tp.

v. Gracey, 111

McCance v. London & N. W. Rv.

of Brant, 64 v. Cookson, 221

v. McCallum, 398

v. Provincial Ins. Co.,

vold, 232 nool Sec. 6, Tp. rant, 64 on, 221 y, 111 llum, 398 ncial Ins. Co., n & N. W. Ry.

loo F. M. Ins.

ssie, 299 , 219, 220 n, 202 tins, 215 zey, 184 rk, 251 3ell, 192

swick, 76 eod, 250 oo M. F. Ins. Co., 50

83 kes, 5 Dermid, 75, 76 son, 214 hson, 295, 802

ton, 148 neron, 318 land, 151, 208, 293 lott, 181 ld, 170 rrestal, 82 llister, 249 ne, 84

Donald, 316 bertson, 285 ddell, 294, 296 bDowell, 233, 294,

gilvie Milling Co.,

ndon Masonic Ben. , 58 te, 402

, 358 212 un, 149 n, 852 Causland, 298 inchell, 250 ddleton, 97 McGregor v. Gaulin, 211 v. Hawke, doe d., 181

v. Harris, 149 v. McNeil, 83

v. Norton, Re,11, 59, 126, 175, 178, 234, 323, 366, 374

McGuin v. Benjamin, 156 v. Fretts, 95 McGuire v. McGuire, 398 McHardy v. Hitohcock, 201 McInnes v. Hardy, 326

McIntes v. Hardy, 320 McIntosh v. G. W. Ry. Co., 201, 209 McIntosh v. Jarvis, 27, 106

v. McIntosh, 357 McIntyre v. Canada Co., 149

v. Hockin, 100 y. Stata, 298

McKay v. Cummings, 384 v. Fee, 210

v. Howard, 349 v. Martin, 77, 392 v. Palmer, 60

v. Tait, 246 McKelvey v. McLean, 86, 87, 354 McKenna v. Everett, 200, 201

McKenna v. Everett, 200, 201 McKenzie v. Bussell, 339 v. Harris, 130, 147

v. Keene, 107, 212 v. Ryan, 105, 346, 391 v. Stewart, 169

McKillop v. Logan, 286 McKindsey v. Armstrong, 250, 270. McKinnell v. Robinson, 65 McLaren v. Canada Central Ry. Co.,

211

McLay v. Sharp, 98 McLean v. Allen, 94, 95, 265, 291

v. Bradley, 8, 339 v. Bruce, 94, 259

v. Hamilton St. Ry. Co., 97

v. Jones, 141

v. Pinkerton, 33, 158, 237 v. McLeod, 60, 212, 252,

282 v. Sudworth, 249 McLeish v. Howard, 28, 29, 384

McLellan v. McClellan, 227 McLeod v. Chetwynd, 220

v. Emigh, 63, 322, 328, 330, 333, 394, 401

v. Fortune, 299 v. Pearson, 225 v. Sandle, 86

v. Torrence, 197 McMahon v. Spencer, 5 McManus v. Cooke, 93, 102 McMartin v. Hurlburt, 300, 385 McMichael v. Wilkie, 396

McMillan v. Byers, 81

v. Gore Dist. M. F. Ins. Co., 214

v. McDonald, 168 v. McMillan, 202

McMurray v. Northern Ry. Co., 292 v. Wright, 55

McMyn, In re. Lightbown v. Mc-Myn, 30, 141

McNab v. Taylor, 92 v. Wagstaff, 164 v. Howland, 83

McNair v. Boyd, 387 McNamara v. McLay, 313

McNaughton v. Webster, 246, 262, 295, 315

McNeill v. Haynes, 68 McPhadden v. Bacon, 337 McPhatter v. Leslie, 340, 385 McPherson v. Forrester, 5, 147, 291 v. McPhee, 208

v. McPhee, 208 v. Tisdale, 246, 248 McRae v. Clarke, 28, 333

v. Lemay, 287 v. Robins, 103, 104, 105 McRobbie v. Torrence, 76

McWhirter v. Bongard, 62, 115 v. Learmouth, 364

N.

Naef v. Mutter, 185 Nagle-Gillman v. Christopher, 324 Nash v. Dickenson, 294

v. Hodgson, 186 v. Lucas, 332 v. Pease, 248, 249

Natal Inv. Co., In ..., 317 Nathan v. Cohen, 119 Nathans v. Giles, 250, 267

National Alliance Co., Re. Axworth's Case, 97

National Prov. Bank of England v. Jackson, 3 Neads v. McMillan, 69

Neale v. Ellis, 103 v. Withrow, 198

Nedley v. Buffalo, B. & G. Ry. Co.,

Negus v. Jones, 397 Neill v. McMillan, 383

Neilson v. Jarvis, 24, 282, 296, 808, 310

Nelson v. Baby, 28

v. Couch, 4, 106

v. Thorner, 157, 159, 219

Nerlich v. Clifford, 56, 64 v. Mallov, 28, 257 Nesbitt v. Armstrong, 157 Ness v. Stevenson, 254 Ness v. Saltfleet (Mun.)., 11 Nevill, In re, 295 Newcombe v. De Roos, 110 Newell v. Jones. 209 v. Nat. Pro. Bk. of England, v. Van Praagh, 327, 328 Newfoundland (Govt.) v. Newfoundland Ry. Co., 97 New Haven Saw Mill Co. v. Fowler, 146 Newman's Bail, 226 Newman, Re, 96 Newman v. Merriman, 303 v. Rook, 260 Newton, In re, 218 v. Chaplin, 170 v. Harland, 189 v. Newton, 92 Nichall v. Cartwright, 288 Nichol v. Thompson, 209 Nicholl's Bail, 226 Nicholls v. Cummings, 36, 194 v. Jones, 192 v. Lundy, 290 v. Morgan, 401 v. Nicholls, 212 Nicholson v. Brooke, 170 Nicol v. Ewin, 342 Nightengale v. Bank of Montreal, 277 Nisbet v. Cock, 119 Nixon v. Nanney, 378 Noble v. Cline, 110 Nohro, Ex parte, 108 Nolan v. Urook, 250, 267 Noonan v. Bank of B. N. A. 168, 169 Norburn v. Hilliam, 233 Nordheimer v. McKillop, 196 v. Robinson, 82 Norman v. Hope, 29, 87 v. Ricketts, 277 Normanby v. Jones, 120 Norris v. Carrington, 60, 224 North v. Fisher, 5, 181 v. McDonald, 338 v. Stewart, 252 Northcote v. Brunker, 67, 378

Northern Ry. Co. v. Lister, 190,

North London Ry. Co. v. Great Northern Rv. Co. 92

North Ontario Election, Re. 374

147

North Perth, Re. Hessin v. Lloyd, North Victoria Election, 42 Northwood v. Rennie, 245 Norton v. Ellam, 171 Norton v. Melbourne, 196, 200 v. London & N. W. Ry. Co., 224, 229 v. Turvill, 400 Notman v. Crooks, 185 Nott v. Gordon, 286 v. Nott, 285 v. Sands, 247 Nowlan v. Ablett, 100 Noxon v. Holmes, 110 Noves v. Crawley, 182 Nugee v. Swinford, 134 Nugent v. Chambers, 108 Nutter v. Accrington Local Bd of Health, 43. 0.

Oaires v. Morgan, 164
Obernier v. Robertson, 384
O'Brien v. Irving, 75
v. Welsh, 108
O'Callaghan v. Cowan, 358
O'Dea v. Hickman, 384
Odell, Ex parte. In re Walden, 296
O'Donohue v. Wiley, 24, 110
O'Donovan v. Dillon, 260
Offay v. Offay, 152, 154, 337, 340
Official Receiver, Ex parte, 333
Ogden v. Craig, 360
Ogle v. Knipe, 316
Ohlsen v. Terrero, 202

Oldham, B. & M. Co. v. Heald, 112 Oldham v. Ledbetter, 248 v. Ramsden, 65 O'Leary v. Stewart, 104

Oliphant v. Leslie, 292, 385 Oliver v. Dickey, 200 v. Newhouse, 295 v. White, 300

Olmstead and Errington, 62, 64, 110 Omnium Sec. Co. v. Richardson, 185 O'Neill, Ex parte, 330 v. Cunningham, 247

Ontario Bank v. Burke, 159 v. Harston, Re, 55 v. Kerby, 310 v. Mitchell, 328 v. Smith, 196

Ontario Glass Co. v. Swartz, 86, 134, 137, 260, 269 Ontario Loan & Deb. Co. v. Hobbs,

88 km, 358 km, 358 km, 358 km, 358 km, 296 km, 24, 110 km, 260 km, 260

02 b. v. Heald, 112 c, 248 , 65 104 92, 385) 295 gton, 62, 64, 110 Richardson, 185

am, 247 rke, 159 rston, Re, 55 rby, 310 rchell, 328 ith, 196 y. Swartz, 36,

Co. v. Hobbs.

Ontario v. Quebec, Re, 11, 16 Ont. Salt Co. v. Merchants Salt Co. 3, 339

Oram v. Brearey, 257 Ormerod v. Todmorden Co., 254 Ormichund v. Barker, 194 O'Rourke v. Lee, 82 Orr v. Barrett, 64 O'Shea v. Wood, 192 Osgood v. Nelson, 374 Osler v. Mutter, 300 Ostler v. Bower, 358 O'Sullivan v. Lake, 230 Otis v. Rossin, 132

Outhwaite v. Hudson, 164 Overend, Gurney & Co., Re. Barron's Case, 210 Overseers of Everton, Ex parte, 63 Owen v. Hurd, 283

v. Wolley, 184 Owens v. Bull, 295 v. Shield, 247

Ρ.

Pacaud v. McEwan, 86
Paquette, Re, 9, 55
Padwick v. Scott, 97, 98
Page v. Austin, 165
v. Newman, 209
Paine v. Layton, 191
v. Pritchard, 210
Palk v. Kenney, 384, 387
Palliser v. Gurney, 270, 395
Palmer v. Bate, 250
v. Caledonian Ry. Co., 112
v. Fahnestock, 78
v. Forsyth, 108
v. Lovett, 251, 279

v. Temple, 4
Palomares, Re, The, 372
Pappa v. Rose, 60
Pardee v. Glass, 383
Paris Manufacturing Co. v. Walls,
358

Park, doe, v. Henderson, 197 v. Willcock, 289 Parker v. B. & E. Ry. Co., 107 v. Bland, 152, 159

v. Gossage, 33 v. Howe, 246, 247, 250, 262 v. Kett, 24

v. McKenna, 245 v. Roberts, 288 Park Gate Iron Co. v. Coates, 158, 223, 224, 226, 229 Paiks v. Davis, 23, 30, 31, 54, 257 Parminter v. Parminter, 185

Parnell v. Walker, 168 Parrett v. Lortie, 94 Parsons v. Crabbe, 22, 372 Parton v. Williams, 379 Partridge v. Elkington, 384 v. McIntosh, 295 Passmore v. Harris, 197 Pater, Ex parte, 369, 370 Paterson v. Todd, 318 Paton v. Scram, 342 Patten v. Wood, 101 Patterson v. Fuller, 84, 86, 87 .v. McKellar, 298 v. Richmond, 247, 249 Pattison v. Mills, 110 Pattypiece v. Mayville, 218 Paul v. Joel, 256 Pawson v. Hall, 119 Paxton v. Baird (Addenda), 161

Paxton v. Baird (Addenda), 16 Payne, Ex parte, 54 v. Newberry, 157 Peacock v. The Queen, 290 Pearce v. Chaplin, 230

v. Walker, he, 402 Pearse v. Rogers, 237 Pearson v. C. P. Ry. Co., 113 v. Essery, 322, 394 v. Glazebrook, 69

v. Foster, 101

v. Ruttan, 29, 30, 31, 141, 379, 384

Pease v. Chaytor, 61

Peck and Peterborough (Corp.), Re,

v. McDougall, 321
Peckham v. Depotty, 102
Pedley v. Davis, 330, 379
Peers v. Carrall, 295
Peirse v. Bowles, 174
Pell v. Dauberry, 190
Pelton v. Harrison, 157, 894, 399,

400, 401
Penton v. G. T. Ry. Co., 227
Peppercorn v. Hoffman, 380
Pering v. Keymer, In re, 11
Perkins v. Dangerfield, 215
Perks v. Mylrea, 401
Perlet v. Perlet, 100
Perras v. Keefer, 279
Perren v. Monmouthshire Ry. & Canal Co., 177

Canal Co., 177
Perrin v. Bowes, 301
Perry v. Dickerson, 104
v. Gibson, 191
v. Newcastle, 263

v. Newcastle, 263 Peters v. Beers, 198 Petit v. Ambrose, 130 Peto v. Blades, 296 Petre v. Duncombe, 30, 209 Pewtress v. Harvey, 63 Phelps v. St. Catharines & N. C.

Ry. Co., 251

Phillips v. Austin, 250 v. Canterbury, 319

v. Dixon, 141 v. Foxall, 100

v. Henson, 254

v. London & S. W. Ry. Co.,

v. Phillips, 182, 232

Philpott v. Jones, 67 v. Lehain, 4

Phipps v. Ingram, 285 Pickard v. Banks, 66

Pickering v. Ellis, 102 Picton, The, 218 Pidsley. In re, 118

Pierpoint v. Brewer, 226 Pigeon v. Bruce, 130

Pigg v. Clarke, 255 Piggott v. Birtles, 340 Pike v. Fitzgibbon, 157

Pilgrim v. Knatchbu l, 112 Pilkington v. Riley, 385

Piller v. Roberts, 217 Pilley v. Robinson, 143 Pillow v. Roberts, 3

Pimm v. Greville, 174

Pindar v. Robinson, 402 Pineo v. Gavaza, 85

Pinhorn v. Tulkington, 209 Pirie v. Wild, 29, 185

Pitcher v. King, 189 Pitt v. Coomes, 349

Platt v. G. T. Ry. Co., 219, 231 Playfair v. Musgrave, 305

Pleiffer v. Midland Ry. Co., 230 Piummer v. Price, 359

Polak v. Everett, 126 Pole v. Bright, 217

Polglass v. Oliver, 172 Pollard, Re. 133, 194, 265, 37)

Pond v. Dimes, 201 Ponsford v. O'Connor, 191

Poole v. Gould, 132, 190 v. Tumbridge, 171, 174

Poor v. Hudson Ins. Co., 255 Pope, Re, 95

Popple v. Sylvester, 112 Porter v. Flintoff, 359 v. Stevens, 270

Portman v. Patterson, 68 Postlethwaite v. Gibson, 379 Pott v. Flather, 245 Potter v. Carroll, 341

v. Knapp, In re, 15, 285

Potter v. Pickle, 148, 288 Potts v. Leask. 141

Pousett and the Q.S. of Lambton, 17 Powell v. Appolo Candle Co., 391

v. Peck, 210 v. Williams, 233

Powers, In re. 181 Powley v. Whitehead, 59, 290

Poyser v. Minors, 391 Preble and Robinson, Re, 286

Prentice v. Consolidated Bank, 218 Prescott Election, In re, 233

Preston v. Wilmot, 28, 304 Price, Re. Stafford v. Noble, 400

v. Bower, 134 v. Howard, 191 v. Messenger, 379 v. Plummer, 359

v. Thomas, 131, 156, 296

v. Torrington, 207 v. Wade, 5, 181 Prichard v. Nelson, 180

Prickett v. Gratrex, 385 Priddee v. Cooper, 131 Prideaux v. Warne, 83

Priestman v. Bradstreet, 101 Prince v. Lewis, 309

v. Samo, 202 Prine v. Beesly, 226 Pritchard v. Bagshawe, 180

Fritchard's Claim, 248 Proctor v. Jarvis, 293 v. Williams, 286

Prout v. Gregory, 249 Provincial Ins. Co. v. Shaw, 132 Provisional Corp. of Bruce v. Cro-

mer, 30 Prudhomme v. Lazure, 108

Pryce v. Hole, 384 Prynne, Re, 395

Pryor v. City Office's Co., 98, 157, 163, 214, 394

Public School Trustees Nottawasaga v. Nottawasaga, 106, 346

Pugh v. Kerr, 138 Purdy, Ex parte, 328 Purser v. Bradburne, 70 Putnam v. Price, 342 Pybus v. Gibb, 25, 29 Pyke, Ex parte, 65 Pyne v. Kinna, 250

Quackenbush v. Snider, 339 Quebec Bank v. Radford, 157 Queen v. Hession, 98 Quincey v. Sharpe, 183, 184

8, 288

of Lambton, 17 andle Co., 391

. 233

ad, 59, 290 891

on, *Re*, 286 idated Bank, 218 In re, 233

v. Noble, 400 34

191

r, 379 r, 359 131, 156, 296

on, 207 181

n, 180 ex, 385 c, 131 ne, 83

dstreet, 101 309 02

226 shawe, 180 n, 248 , 293

ms, 286, 249 o. v. Shaw, 132

of Bruce v. Croazure, 108

ffice's Co., 98, 157,

astees Nottawasaga aga, 106, 346

8 328 ırne, 70

, 342 5, 29 15

Snider, 339

pe, 183, 184

Radford, 157

Q.

n, 98

250

v. Bembridge, 22 v. Benson, 252, 253

v. Berkshire (Justices), 122

v. Bittle, 226

R.

Race v. Anderson, 284

Rackham v. Blowers, 219 Radcliffe v. Bartholomew, 53, 118, 212, 386

Railway Sleepers Supply Co., In re, 122, 129, 386

Ralph v. G. W. Ry. Co., 111 Randall v. Brigham, 59

v. Lithgow, 248, 261, 262, 272

Rapelje v. Finch, 349 Rastall v. Attorney-General, 32 Rathbone v. Munn, 220

Ravenscroft v. Wise, 177 Rawlin's Bail, 226

Rawstone v. Preston Corp., 192 Rawstorne v. Gandell, 317 Ray v. Barker, 158

Read v. Anderson, 65 v. Brown, 102, 110, 111

v. Goldring, 171 v. Wedge, 105

Redhead v. Mid. Ry. Co., 245 Reading v. London School Bd., 30,

Reddick v. Traders' Bank, 75, 147 Redding, Re, 77

Redmond v. Redmond, 102 Redpath v. Williams, 130 Reece v. Miller, 69

Reed v. Fairless, 190 Reeves v. Butcher, 181

Reford v. McDonald, 197, 203 Regan v. McGreevy, 328 Reid v. Dickons, 177

v. Gowans, 302 v. McDonald, 82, 222, 358, 360

v. McLeod, 246 v. McWhinnie, 378

v. Ramsay, 230 v. Reid, 398

R. v. Aberdare Canal Co , 122

v. Allan, 118 v. All Saints, Southampton, 54

v. Armytage, 343

v. Assessment Com. of St. Mary Abbotts, 170

v. Arkwright, 59, 61 v. Badger, 329

v. Beard, 67

v. Borron, 22 v. Brent, 41

ofte. R. v. Brempten Co. Ct. Judge, 327,

v. Burah, 391

v. Cambridge, 19 v. Canterbury (Archbishop), 86 v. Cashiobury (Justices), 218

v. Chapman, 60, 880

v. Cheshire (Justices), 27 v. Cheshire Lines Com., 8, 36, 150

v. College of Physicians and Surgeons, 8, 36

v. Collins, 8, 59, 338 v. Court of Revision Cornwall.

11, 223 v. Cowper, 77, 318

v. Crouch, 158 v. Cummings, 338

v. Davies, 41 v. Davidson, 69, 337

v. Davis, 22 v. D' Eon, 168

v. Doty, 168, 360, 362, 364

v. Eli, 60

v. Ellis, 336, 353 v. Essex, 45, 55, 211, 297

v. Everett, 68, 70 v. Farmer, 323 v. Farrant, 60

v. Fee, 13, 17, 20 v. Fenn, 190

v. Fick, 213 Ex rel., Flannigan v. McMahon. 36

v. Fletcher, 87, 88, 63, 64, 120, 224, 301

v. Frost, 238 v. Gamble, 99

v. Gibson, 166 v. Gordon, 119

v. Gould, 32, 313 v. G. W. Ry. Co., 148, 167

v. Greenwich (Judge), 60 v. Halifax (Judge), 71

v. Hall, 158

v. Hammond, 111 v. Hampshire, 71

v. Handsley, 59 v. Hanson, 218

v. Harden, 69 v. Hart, 169

v. Hartley, 378 v. Harvey, 44

v. Harwood, 232 v. Hazzell, 378 v. Heffernan, 158

v. Helling, 54 v. Henry, 327

v. Hickling (Inhabitants), 378

R. v. Hill, 12

v. Hodge, 24, 41

v. Hodges, 124

v. Howard, 13

v. Huddersville (Inhabitants), 201

v. Hughes, 158, 166, 323, 339, 377

v. Huntingdonshire (Justices), 125, 221

v. Hyde, 27

v. Ipswich (Recorder), 218

v. Johnson, 338 v. Jones, 318, 378

v. Jordan, 329, 332, 371, 372, 378

v. Kemp, 60

v. Kent (Justices), 77, 230

v. Kenyon, 108

v. Kings Lynn (Recorder), 378

v. Law, 8, 120

v. Lambeth, 329, 331

v. Lancashire (Judge), 249

v. Langford, 60

v. Langridge, 120, 224

v. Lee, 59

v. Leeds (County), 129

v. Leeming, 30

v. Lefroy, 238, 370

v. Leominster, 157, 190

v. Lightfoot, 137

v. Lincolnshire (Judge), 61, 90, 94 (Justices), 125, 221

v. Local Govt. Board, 33

v. Lock, 126

v. London (Bishop), 254

v. Lord Mayor, 62

v. London Chatham & Dover Ry. Co., 18, 45

v. Ludmore, 319

v. Malty, 301

v. Marsh, 378

v. Marylebone C. C., 155, 170, 255

v. Mason, 41, 236

v. Menary, 377

v. Meyer, 18, 219

v. Middlesex (Justices), 33, 230

v. Milledge, 59

v. Murray, 118, 148, 167

v. McFarlane, 250

v. Newcastle-on-Tyne (Justices), 230

v. Nichol, 125, 221, 280

v. North Curry, 31

v. North Riding of Yorkshire

(Justice), 156

v. Oxford, 323 4.6 (Bishop), 9, 15, 20, v.

59, 118, 241

v. Pah-Mah-Gay, 194

R. v. Palmer, 68

v. Paulett. 15, 391

v. Peckham, 375

v. Potter, 315

v. Price, 136

v. Priest, 69

v. Raffles, 67 v. Rand, 19

v. Riall, 108

v. Richards, 64

v. Richardson, 60, 219, 378

v. Ridgway, 378 v. Rowland, 13, 37, 234

v. Sainsbury, 22, 125

v. Salop (Justices), 20, 221

v. Sandford, 69

v. Savage, 238

v. Severn, 24

v. Shavelear, 20

v. Shaw, 158, 343, 377

v. Sheffield (Judge), 221

v. Sherlock, 43, 332

v. Shropshire (Judge), 122, 305, 375

v. Smith, 25, 36, 67, 158, 233

v. Southampton (Judge), 64

v. Staunton, 27

v. Stimpson, 62 v. Stock, 218

v. Stone, 158

v. Stonor, 328

v. Stretch, 190

v. Stubbs, 220

v. St. Albans (Bishop), 16

v. Suffolk (Justices), 19

v. Surrey (Judge), 370

(Justices), 20, 122, 125 v.

66 (Sheriff), 119 v.

v. Sussex, 122

v. Sutton, 237

v. Sweney, 229

v. Taylor, 68

v. Tisdale, 22, 373

v. Tomb, 151

v. Totness, 54

v. Twiss, 58

v. Verelst, 13

v. Vreones, 287

v. Wellard, 43

v. Wellings, 201, 326

v. Wells, 224

v. West Houghton, 230 v. Westmoreland Co Ct., 58

v. Widdop, 158

v. Wigan, 17

v. Wintersett, 101

v. Wyat, 22

v. Yorkshire (W. R Justices), 229

0, 219, 378 37, 234 , 125 es), 20, 221 43, 377 lge), 221 332 Judge), 122, 305, 6, 67, 158, 233 n (Judge), 64 Bishop), 16 tices), 19 ge), 370 ces), 20, 122, 125 ff), 119 873 1, 326 ton, 230

nd Co Ct., 58

V. R Justices), 229

101

Rennie v. Ratcliffe, 111 Republic of Costa Rica v. Strousberg, 323 Republic of Peru v. Weguelin, 161 Rettinger v. Macdougall, 100 Revett v. Brown, 164 Reynolds v. Allan, 173 v. Barford, 366 v. Gallihar Gold Mining Co., 149 v. Streeter, 295 Rhoades v. Selsey, 209 Rhodes v. Liverpool Com. Inv. Co., 218, 220 v. Rhodes, 209 v. Smethurst, 180 Rhymney Ry Co. v. Rhymney Iron Co., 147, 210 Rice v. Fletcher, 337 v. Howard, 202 v. Jones, Ex parte, 323 Rich v. Cockell, 398 v. Stark, 202 Richards v. Cullerne, 90, 160, 201, 371 v. Jenkins, 233, 358 v. Martin, 103 Richardson v. Buswell, 300 v. Can. West Farmers' Ins. Co., 237 v. Davies, 202 v. Elmit, 249 v. Howell, 149 v. Jackson, 174 v. Shaw, 57, 169 v. Silvester, 220, 230 v. Willis, 9 Richmond v. Proctor, 288 Ridgway v. Cannon, 135 Ridley v. Sutton, 202 v. Tullock, 107 Riley v. Hirst, 251 v. Warden, 253 Rishton v. Grissell, 209 Riseley v. Ryle, 365 Ritchie v. Smith, 67 Ritchie, Re. Sewery v. Ritchie, 102 River Steamer Co., In re. Mitchell's Claim, 185 Rivers v. Griffiths, 174 Rix v. Elliott, 246 Robb v. Murray, 77, 105. 143 Roberts v. Booth (Addenda), 97 v. Corp. of Toronto, 249 v. Dawson, 94 v. Death, 252 v. Humby, 56 v. Lucas, 4

Roberts v. Orchard, 388 Robertson, In re, 119 v. Cornwell, 57 v. Coulton, 62, 337 v. Fortune, 298, 367 v. Jenner, 100 v. Laroque, 157, 398 Robins v. Bridge, 190 v. Coffee, 85 v. Empire Ptg. Co., 196 Robinson, Re, 249 v. Cook, 173 v. Davidson, 101, 326 v. Davies, 197, 203, 285 v. Emanuel, 245 v. Gell, 211, 293 v. Harman, 177 v. Hindman, 101 v. Lenaghan, 132 v. Nesbitt, 251, 265 v. Pickering, 92, 402 v. Piece, 315 v. Rapelje, 214 v. Roland, 187 v. Shistel, 102 v. Waddington, 118 Roblin v. McMahon, 183 v. Rankin, 248 Robson v. Waddell, 312 v. Worswick, 192 Rochfort v. Rynd, 384 Rodger v. Comptoir D'Escompte De Paris, 317 Rodgers v. Parker, 382 Rodman v. Munson, 146 Rodway v. Lucas, 130 Rodwell v. Phillips, 296 Roe v. Roper, 359 Rogers v. Dutt, 257 v. Highland, 296 v. Hunt, 147 v. Kennay, 358 v. Manning, 197 v. Ontario Bank, 294 v. Quinn, 185 v. Whitely, 247, 261 Rossier v. Westbrook, 148 Roland v. Gundy, 83 Rolfe v. Learmonth, 113, Rolker v. Fuller, 301 Rolt v. Gravesend (Mayor, etc.), 298 Ronald v. Brussels, 223 Rooda v. Gun & Shot & Griffin's Wharves Co., 362 Rooke's Case, 5 Root v. Woodward, 214 Roper, Re. Roper v. Doncaster, 397 Rorke v. Errington, 61

Rosier, Re. Jones v. Bartholomew.

Ross, Re, 182, 293, 327

v. Buxton, 93 v. Farewell, 45

v. Grange, 169, 293, 319, 348

v. Hamilton, 293

v. McLay, 313, 384

v. Perrault, 211 Rotherham v. Priest (Addenda), 159

Rourke v. Short, 65 Routledge v. Ramsay, 185 Rowan v. McDonell, 333 Rowbotham v. Dupres, 149 Rowe v. G. T. Ry. Co., 214

v. Jarvis, 294, 298 Rowland v. Vitzetelly, 156 Rowlett v. Lane, 270

Rowley v. Biglow, 82 v. Unwin, 401

Royal Can. Bank v. Matheson, 336 v. Mitchell, 398

Rucker v. Hannay, 180 Rudd v. Frank, 192 Rumbelow v. Whalley, 177 Rumohr v. Marx, 315, 353 Runnacles v. Mesquita, 155, 158 Rush, Re. 9

v. Smith, 191 Russell v. Cambefort, 137, 144

v. G. W. Ry. Co., 196 v. Williams, 107 Rutherford v. Walls, 64

Ruttan v. Short. 86 Ryan v. Devereux, 202

v. McCartney, 312 v. Rvan, 218

v. Simonton, 223

Ryder v. Townsend, 174 Ryley, Re, 333 Rymill v. Wandsworth, 267

S.

Saggers v. Gorden, 223 Salaman v. Donovan, 247 Salford (Mayor of) v. Lever, 320 Salisbury v. Sweetheart, 156 Salt v. Cooper, 94 Salter v. McLeod, 332

Samis v. Ireland, 297, 313 Sampson v. Seaton & Beer Ry. Co.,

Sams v. City of Toronto, 122. Samuel v. Payne, 43 Sanders v. Malsbury, 397

v. Stuart, 245 Sanderson v. Ashfield, 188 Sanderson v. Bell. 172

v. Coleman, 383 Sandilands, Re. 3 Sandiman v. Breach, 216

Sandon v. Jervis, 332 Sandys v. Louis, 98 Sangster v. Kay, 113

Sanson v. Sanson, 247 Sargant v. City of Toronto, 81

Sargent v. Wedlake, 317 Sartoris v. Sartoris, 95

Sato v. Hubbard, 248, 259, 279, 323 Saunders v. Graham, 172

v. Pitman, 168 Saunderson v. Baker, 374 Savage v. Hall, 226 Saxon v. Castle, 238

Scales v. Sargeson, 361 Schamehorn v. Traske, 361 Scane v. Coffey, 337 v. Duckett, 187

Scanlan v. Usher, 231, 232 Scarf v. Jardine, 4, 145 Scarth, Re. 248 Schaffer v. Dumble, 81 Schneider v. Agnew, 41, 326

v. Norris, 77 Schofield v. Bull, 149 Schofield and wife, Re, 398 Scholes v. Hilton, 189, 190

School Trustees, Hamilton v. Neil, 13

Schreger v. Carden, 177 Schroeder v. Hanrott, 357 Schultz v. Wood, 168 Scott v. Carveth, 294

v. Lewis, 360 v. McRae, 81

v. Mitchell, 151, 208 v. Morley, 270, 322, 401

v. Shephard, 75 v. Stansfield, 18

v. Uxbridge & Rickmansworth Ry, Co. 174

v. Wve. 157 Sear v. Webb, 158 Searle v. Choat, 95, 251 Searles v. Sadgrave, 172 Seaton v. Fenwick, 149 Seaward v. Williams, 361

Secor v. Sturgess, 104 Segsworth v. Meridan S. Plating Co. 362

Selmes v. Judge, 383 Serjeant v. Dale, 54, 58, 118 Senoka v. Kattenburg, 395

Serverance v. Civil Service Supply

Assn., 394, 402

172 nan, 383 h, 216 32 8 13 247 Toronto, 81 a, 317 is, 95 248, 259, 279, 8**23** am, 172 an. 168 ker, 374 6 38 1, 361 raske, 361 37 , 187 , 231, 232 4, 145 ole, 81 ew, 41, 326 ris, 77 149 le, Re, 398 , 189, 190 Hamilton v. Neil, len, 177 nrott, 357 , 168 , 294 860 81 l, 151, 208 270, 322, 401 rd, 75 ld, 18 ge & Rickmansworth lo. 174 58 95, 251 ave, 172 ick, 149 liams, 361 ss, 104 eridan S. Plating Co.

e, 883

402

e, 51, 58, 118

enburg, 395

Civil Service Supply

Sewell v. Jones, 69 Seymour v. Cooper, 255 Shakespeare, Re. Deakin v. Lakin, Shanley v. Moore, 247, 249, 250 Sharp v. Matthews, 338 Sharpe, In re, 151, 208, 224 v. Fortune, 366, 367 v. Leitch, 295, 315 Shaver v. Hart, 231 Shaw v. Jersey, 93 v. McCreary, 395 v. McKenzie, 337, 352 v. Morley, 124 v. Nickerson, 169 v. Shaw, 245 v. The Corp. of Manvers, 11 Shelford v. L. & E. C. Ry. Co. 151 Shepley v. Hurd, 29 Sheppard, In re. Atkins v. Sheppard, 94 v. Gilmour, 93 Sherburne v. Middleton, 231, 232 Sherwood v. Cline, 56, 59 Shields v. G. N. Ry. Co., 112, 113 Shingler v. Holt, 359 Shippey v. Grey, 252 Shoppee v. Nathan & Co., 373 Shorey, In re. Chief Superintendent v. Thresher, 11 Shorsberry v. Osmaston, 352 Shropshire v. Glascock, 66 Shultz v. Reddick, 318, 382 Sibbald v. Roderick, 81 Sibeth, Ex parte. Re Sibeth, 898 Siddall, Re, 113 v. Gibson, 60, 61, 62 Sifton v. McCabe, 184 Siggers v. Evans, 126 Sillence, In re, 371 Sills v. Hunt, 80 Simmons v. Storer, 38 v. The Corp. of Chatham, In re, 11 Simms v. Henderson, 196 Simpson v. Chase, 95, 223, 246, 248, 260, 264, 268, 273 v. Hutchinson, 95 v. Ingham, 67 v. London & N. W. Ry. Co., 245 Sims v. Kelly, 61 v. Prosser, 119 Sinclair v. Baby, 30 v. Sinclair, 217 Sinden v. Brown, 383 Singer v. Williams Manfg. Co., 197 Sisdell v. Cunningham, 273

Sisted v. Lee, 149 Six Carpenter's Case, 382 Skeet v. Lindsay, 183, 184 Skirving v. Ross, 179 Slade's Bail, 225 Slaght v. West, 299, 861 Slater v. Mosgrove, 186 Sleeman v. Barrett, 253 Sloan v. Creasor, 29 Slocum v. Sims, 60 Sloman v. Walter, 96 Sly v. Stevenson, 379 Small v Nairne, 197 Smalley v. Gallagher, 81, 84 Smalpage v. Tonge, 296 Smart v. Hutton, 29 v. Miller, 247, 251, 259 v. Niagara & Detroit Ry. Co., 130, 147, 151 and O'Rielly, Re 57, 220 Smith v. Anderson, 113 v. Antipitzky, 305 v. Aubrey, 81 v. Babcock, 197 v. Baker, 218, 245 v. Barnham, 238, 329 v. Bernie, 293 v. Blundell, 149 v. Burn, 182 v. Campbell, 114 v. Clarke, 250, 267 v. Cobourg & Peterboro' Ry. Co., 294 v. Cowell, 94 v. Critchfield, 222, 349, 358, 359, 368 v. Dart, 213 v. Day, 93 v. Douglas, 220 v. Durant, 231 v. Edwardes, 159 v. Everett, 128 v. Fleming, 286 v. Goff, 287 v. Grant, 76 v. Greey, 195, 196, 200 v. Hallen, 198 v. Hill, 134 v. Keal, 299, 361 v. Lancaster, 254 v. Lawlor, 92 v. Muirhead, 230 v. Nicholls Co., 108 v. Poole, 183 v. Pritchard, 384 v. Redford,

v. Russell, 3

v. Smith, 337

Smith v. Spurr, 156

v. Thompson, 101

v. Thorne, 185

v. Truscott, 189

v. West Derby Bd., 884

v. Whitlock, 401

v. Wintle, 130, 131

Snarr v. Badenach, 210

Sneary v. Abdy, 47

Snelgrove v. Stevens, 191

Snider v. Prown, 383

Snow v. Hill, 124

Société Genéralé de Paris v. Tramways Union Co., 158

Solicitor, In re, A, 156

Solomon v. Howard, 168

Sorenson v. Smart, 4

Soules v. Little, Re, 57, 212

v. Soules, 147

Southam, Re. 16

South Australia Ins. Co. v. Randall,

Southwark & Vauxhall Water Co.

v. Quick, 192

Spain v. Arnott, 101

Spalding v. Parker, 182 Sparks v. Barrett, 196

v. Young, 246

Speck v. Phillips, 177

Speeding v. Young, 200 Speers v. G. W. Ry. Co., 168

Spellman v. Spellman, 191

Spence v. Hector, 209

Spicer v. Todd, 317

Spigener v. State, 377

Spong v. Wright, 183, 184

Sprague v. Nickerson, 102

Spry v. McKenzie, 81

Spurr v. Hall, 177

Spybey v. Hide, 174

Squair v. Fortune, 295, 314

Squire v. Mooney, 81

v. Wheeler, 329

Stafford v. Clark, 4, 177

Staley v. Bedwell, 362

Stamford, Spaulding & Boston Bkg.

Co. v. Smith, 186

Standard Bank v. Frind, 144, 145 Stanley v. Stanley, 249

Stansfeld v. Hellawell, 87

Stanton v. Lambert, 397

v. Styles, 180, 293

Staples v. Accidental Death Ins.

Co. 107

v. Staples, 251

State v. Bishel, 66

v. Clark, 136

v. Giersch, 67

State v. Oliver, 67 St. Dennis v. Baxter, 214

Stebbins v. Anderson, 197

Steele v. Savory, 192

Steinkeller v. Newton, 202

Stephen v. Dennie, 134 Stephens v. Cousins, 84

v. Laplante, 61

v. Stapleton, 385

Stephenson v. Dallas, 159, 160, 200

v. Baine, 70 Stevens v. Clark, 339

v. Esling, 167

v. Hounslow Burial Bd.,

v. Pennock, 299

v. Phelips, 247

Stevenson v. Hodder, 180

v. Rae, 197

v. Watson, 60

Stewart v. Cowan, 379, 383

v. Forsyth, 77

v. Jage, 186

v. Macdonald, 48, 320

v. Moore, 212

v. Richard, 160

v. Rounds, 215 Stewartson Loan Co. v. Daly, 155

Stikeman v. Dawson, 27

Still v. Booth, 60

Stimson v. Farnham, 28

Stinson v. Scollick, 214

Stirling v. Maitland, 101

St. John v. Rykert, 210

Stanford, Ex p. In re, Barber, 378

Stoeser v. Springer, 83

Stockton Malleable Iron Co., $R\epsilon$, 245

Stogdale v. Wilson, 106

Stogdon v. Lee, 394, 395, 399

Stokes v. Latham, 170

Stokoe v. Cowan, 315

Stone v. Dean, 223 Stoness v. Lake, 36, 158, 377

Stonor v. Fowle, 327, 330

Stooke v. Taylor, 179, 188, 290

Story, Ex parte, 58

v. Finis, 177 Stourbridge Canal Co. v. Wheeley,

Strauss v. Francis, 170, 283 Street v. Glover, 97

Strekert v. East Saginaw, 59

Stringer v. Huddersfield, 67

Stringham v. Supervisors, 146

Strong v. Harvey, 172

Strutton v. Hawkes, 156

v. Johnson, 13, 261

Stuart v. Branton, 169

r, 214 n, 197 on, 202 134 s, 84 te, 61 on, 385 as, 159, 160, 200 ie, 70 39 167 ow Burial Bd., 299 247 er, 180 197on, 60 379, 383 , 77 86ald, 48, 320 212 d, 160 , 215 Co. v. Daly, 155 son, 27 am, 28 , 214 nd, 101 t, 210 re, Barber, 378 r. 83 e Iron Co., $R\epsilon$, 2451, 106 94, 395, 399 , 170 315 3 6, 158, 377 327, 330

7 l Co. v. Wheeley,

179, 188, 290

s, 170, 283 97 Baginaw, 59 ersfield, 67 bervisors, 146 , 172 tes, 156 on, 13, 264 a, 169 Stuart v. Gladstone, 168 v. Grough, 94, 95, 246, 248, 252, 262, 263 Stumore v. Campbell, 96, 246, 250,

Stumore v. Campbell, 96, 246, 250, 267

Sturch v. Clarke, 379 Sturgess v. Claude, 357 Sugg v. Silber, 234

Sullivan v. Corp. of Barrie, 182 v. Francis, 165, 220, 221,

222, 228, 315
Sulte v. Three Rivers, 24
Summerfeldt v. Worts, 56, 65, 68
Summers, Ex parte, 60, 107, 360
v. Morphew, 250
Sun Fire Office v. Hart, 352
Sunbolf v. Alford, 83, 315
Sunderland Local Marine Bd. v.

Frankland, 247
Superintendent of Schools, Re v. Sylvester, 62

Supervisors v. United States, 241 Surman v. Wharton, 397, 400 Surr v. Walmsley, 202 Sutherland v. Dumble, 182 Sutton v. Sutton, 181 Sutton Coldfield Gram, School Re,

Swain, Re. Swain v. Bringeman, 187

v. Stoddart, 362 Swarm v. Sowell, 184 Sweetland v. Neville, 397 Sweetland v. Gosfield, Re, 118 Sweetnam v. Lemon, 262 Sweny v. Smith, 174

Sweny v. Smith, 174
Swift v. Jewsbury, 245
v. Jones, 151, 208
Swinburne v. Carter, 226
Switzer v. Brown, 41
Sykes' Brewery Co. v. Chadwick, 157
Sykes' v. Brockville & Ottawa Ry.

Co., 261, 262, 274 Sykes v. Sacerdote, 97 Symmington v. Symmington, 218 Symonds v. Dimsdale, 108

monds v. Dimsdale, 108 v. Hellett, 400 v. Knox, 180

Synod v. De Blaquiere, 214

T.

Tait v. Harrison, 150
Talbot v. Poole (Addenda), 70, 71
Tancred v. Delagoa Bay Co., 128
v. Leyland, 293
Tanner v. Smart, 182, 185
Tapp v. Jones, 246, 267, 276
D.C.A.—d

Tarrant v. Baker, 384
Tasker v. Sheppard, 101
Tate v. Bodfield, 149

v. Corp. of Toronto, 248, 351, 260, 261, 262, 342

Taylor, Re, 5 v. Addyman, 55

v. Ainslie, 309 v. Ashton, 213 v. Cook, 322

v. Crowland Gas Co., 112

v. Holt, 209 v. Laird, 100 v. Lanyon, 866 v. Meads, 397 v. Parnell, 99, 181 v. Phillips, 132 v. Wood, 217

Teal v. Clarkson, 79 Temperance Col. Soy. v. Evans, 195 Temple v. Toronto Stock Exchange, 15, 33

Templeman v. Reed, In re, 11, 16 Tennant v. Manhard, 145

v. Re...lings, 233
Tench's Trusts, Re, 398
Tetley v. Griffith, 395
Thackorseydass v. Dhoudmull, 65

Tharsis Sulphur Co. v. Loftus, 60 Thayer v. Sherman, 251 The Credits Gerundeuse (Ltd.) v.

Van Weede, 359 Thellusson v. Rendlesham, 19, 231

Thelwall v. Yelverton, 136 Theobald v. Ry. Passengers Ass. Co., 245

Third National Bank of Chicago v. Cosby, 78

Thomas, Re. 113

v. Brown, 166 v. Evans, 172

v. Exeter, etc. Co., 212, 233

v. Harrop, 11 v. Hilmer, 59, 218 v. Hudson, 18 v. Peak, 303

v. Pearce, 180 v. Storey, 200

Thompson, Re, 402 v. Farr, 378

v. Gibson, 41 v. Hay, Re, 56, 60, 121, 122

v. Ingham, 61, 69 v. Kaye, 87

v. Lack, 27 v. McLean, 29

v. Mosley, 191

Thompson v. Parish, 216 v. Pheney, 131 v. Rose, 83 v. Ward, 254 v. Wright, 358 Thornburn v. Barnes, 86, 120, 138, 194, 265 Thornwell v. Wigner, 220 Thorpe v. Brown, 328 v. Burgess, 174 v. Gisborne, 189 Threfall v. Wilson, 402 Thockmorton v. Crowley, 803 Thurgood v. Richardson, 866 Thurlow v. Sidney, 285 Tibbs v. Wilkes, 100 Tiedale, Re, 286 Tiffany v. Bullen, 119, 246, 323 Tildesley v. Harper, 144 Tiley v. Courtier, 172 Tilk v. Parsons, 382 Till v. Till, 897 Tilt v. Jarvis, 299 Timson, Re, 124 Tindall, Ex parte, 292 Tinkler v. Hilder, 57, 861 Tinsley v. Porter, 190 Tipling v. Cole, 208 Tippett, Re. Newbold's Contract, 399 Tobey v. Wilson, 174 Todd v. Robinson, 48, 320 Toft v. Rayner, 60 Tomkins v. Jones, 70 Tomlinscav. Goatley, 133, 260, 265 v. Jarvis, 366, 367 v. Land & Fin. Corp., 362 Toms v. Cumming, 379 v. Luckett, 254 v. Wilson, 371 Toppin v. Buckerfield, 359 Topping, Ex parte, 186 Toronto Brewing & M. Co. v. Blake, Toronto Dental Man. Co. v. Mc-Laren, 4, 140 Toronto, Re Judge of Division Ct., Toronto Savings Bank v. Canada Ass. Co., 210 Torrence v. McPherson, 230 Totten v. Bowen, 398. Toulmin v. Miller, 215, 230 Toward, In re. 128 Town of Dundas v. Gilmour, 98 Townsend v. Croudy, 263 Township Clerk of Euphrasia, Re.

Towsley v. Wythes, 209 Traders' Bank v. Kean, 160 v. McConnell, 281, 298 Trainor v. Holcombe, 64, 68 Trelevan v. Bray, 98 Trent v. Hunt, 318 Trevor v. Wilkinson, 110 Trice v. Robinson, 182 Trimble v. Hill, 66 Trimble v. Miller, Re, 58, 59, 76 Tronson v. Dent, 230 Trotter v. C' ambers, 898 V. of Toronto, 182 Truax v. J 277, 387 Truman v. . grave, 95 Trust & Loan Co. v. Cuthbert, 298 v. Dickson, 21 v. Gorsline, 94. 249 v. Jones, 156 v. Lawrason, 865 Trustees of Nottawasaga v. Nottavasaga, 104 Tubby v. Stanhope, 13, 37, 264 Tucker v. Collinson, 36 Ex parte, 8, 120 In re, 8, 120 Re. Emanuel v. Parfitt, 398 v. New Brunswick, 93 Tuckett v. Eaton, 293, 805 Tuffts v. Mottashed, &... Tullett v. Armstrong, 899 Tully v. Glass, 107 Tunbridge Wells Local Bd. v. Akroyd, 8 Turley v. Williamson, 180 Turnbull v. Foreman, 157, 392 v. Robertson, 251, 261 Turner, In re, 378 v. Bridgett, 363 v. Burkinshaw, 209 v. Goldsmith, 101 v. Hednesford Gas Co., 96 v. Imperial Bank, 221 Jones, 261, 267 Lucas, 162 Mason, 101 Meryweather, 167 Patterson, 293. 295 Robinson, 100 Wilson, 309 Turney v. Dodwell, 186 Turquand v. Dawson, 167 Tyler v. Carlisle, 65 v. Jones, 285

209 an, 160 Connell, 281,

, 64, 68

 $\frac{110}{2}$

e, 58, 59, 76

, 398 oronto, 182 , 387

Cuthbert, 298
Dickson, 21
Gorsline, 94,

Jones, 156 Lawrason, 865 asaga v. Notta-

13, 37, 264 , 36 120

el v. Parfitt, 898 nswick, 98 198, 805 , fil.

local Bd. v. Ak-

on, 180 an, 157, 392 son, 251, 261

t, 363 shaw, 209 ith, 101 ford Gas Co., 96

si Bank, 221 ., 267 201 ., 164, 167 ., 298, 295 ., 100

l, 186 son, 167 55 U.

Union Bank v. Neville, 47
Union F. Ins. Co. v. Fitzsimmons,
24
United Eng. & Scot. Ins. Co., Re,
247
U. S. v. Lancaster, 60
Upton v. McKenzie, 131

V.

Valpy v. Manley, 349 Van Allen v. Wigle, 164 Vance v. Ruttan, 366 Vanderlinden, Ex parte, 292 Vanderlip v. Smyth, 157, 309 Vanderwaters v. Horton, 77 Van Every v. Grant, 83 v. Ross, 233, 361 Vannatter v. Buffalo & L. H. Ry. Co. 381 Van Staden v. Van Staden, 362 Varden v. Wilson, 226 Varden v. Varden, 170, 185 Vashon v. East Hawkesbury, Re, 59 Vavasseur v. Krupp, 97 Veley v. Burder, 58 Venning v. Steadman, 383 Ventriss v. Brown, 292 Verratt v. McAulay, 24, 27, 28, 384 Vestris's Bail, 226 Vestry of Bermondsey v. Ramsey, 140 Victoria Mutual v. Bethune, 248, 270, 272, 278

v. Thompson, 81
Villeneuve v. Wair, 151
Vinall v. De Pass, 259
Vindin v. Wallace, 364
Vineberg v. Guardien F. & L. Assce.
Go., 287
Vines v. Arnold, 104, 106
Virtus v. Haves, 219

v. Davidson, 29, 33

Vines v. Arnold, 104, 106 Virtue v. Hayes, 219 Vogel v. G. T. Ry. Co., 289 Vyse v. Brown, 251, 279

W.

Waddell v. Robertson, 224
Waddington v. Palmer, 134
Wade v. Dowling, 16
v. Simeon, 149
Wadsworth v. Spain (Queen), 62,
269

Wagner v. Mason, 238
Wagstaff v. Jacobowitz, 157
Wamman v. Kynman, 186
Wait v. Sager, 302
Wakefield v. Bruce, 387, 339
Walker v. Butler, 186

v. Friel, 92 v. Hyman, 82 v. McMillan, 170 v. Olding, 361

v. Rawson, 177 v. Rooke, 144, 246, 268 v. S. E. Ry. Co., 351

v. Wi'sher, 185 Walker's Bail, 225 Wallace v. Allen, 63

v. Fraser, 126, 168 Waller v. Andrews, 277 v. Joy, 168

v. Lacy, 188, 186 v. Smith, 96

Walley v. McConnell, 182, 821 Wallingford v. Mutual Society, 153, 159

Wallis v. Harper, 318 Walsh, Re, 110 v. Elliott, 77

v. Ionides, 58 v. Walley, 100 Walter, Re, Clara, 401

Walters v. Coghlan, 224 Walton v. Apjohn, 198 v. Jarvis, 298

Wambold v. Foote, 231 Warburton v. Heyworth, 100 Ward, Re, 124

v. Armstrong, 313 v. Ducker, 168 v. Freeman, 18

v. Nat. Bk. of New Zealand, 27

v. Proctor, 161 v. Raw, 158, 224

v. Vance, 46, 120, 156, 260 v. Wilkinson, 168

Wardrope v. C. P. Ry. Co., 262, 275 Warner v. Mosses, 200, 201 v. Murray, 400

v. Riddiford, 228 Warre v. Calvert, 27 Warren v. Deslippes, 32 v. Twining, 98

Warren's Settlement, 399 Warwick v. Bacon, 156

v. Foulkes, 245 Washburn v. N. Y. V. M. Co., 270 Washington v. Webb, 361

Waterhouse v. Keen, 383

Waterloo Bridge Co. v. Cull, 20 Waters, Ex parte, 371 v. Handley, 115, 132 Waterton v. Baker, 223 Watkins v. Scottish Imp. Ins. Co., 112 v. Vince, 138 v. Washburn, 183 Watson v. Ambergate, etc., Ry. Co., 220 v. Bodell, 18 v. Heatherington, 172 v. Henderson, 295, 360 v. Lillico, 62 v. Lindsay, 182 v. Midwales Ry. Co., 316 v. McDonald, 197 v. Ont. Supply Co, 322 v. Wolverton, 56, 121 Watt v. Barnett, 135, 136, 149 v. Clark, 170 v. Ligertwod, 216, 870 v. Van Every 110 Watts v. Anderson, 196, 197, 198 v. Beemer, 131 v. Howell, 233, 294, 361 v. Jefferyes, 315 Waugh v. Conway, 105 v. Cope, 186 Weatherfield v. Nelson, 391 Weatherly, In re, 41 v. Calder, 113 Webb v. East, 192 v. Page, 189 v. Stenton, 94, 245, 246, 248, 249, 250 Webber, Re, 247 v. McLeod, 352 Webster v. British Empire M. L. Ass. Co., 210 v. Freideberg, 163, 213 v. Gage, 270 v. Haggart, 284 v. Overseers, Ashton. under-Lyne, 255 and Registrar of Brant, Re, 313 v. Webster, 245, 246 Weeks v. Lalor, 82

v. Wray, 136 Weldon v. De Bath, 400

Weller v. Wallace, 130

Wellesley v. Mornington, 93

Wellington v. Chard, 128

v. Winslow, 394

v. Withers, 125

(County) v.

(Tp.), 209

Wilmot

Wellington v. Whitechurch, 111 Welsh v. O'Brien, 86 Wenlock v. River Dee Co., 51 West, Re. Ex parte, Clough, 277 Westbury v. Twigg, 319 Westinghouse v. Mid. Ry. Co., 192. Westley v. Jones, 130 West of England & S. W. Dist. Bank, Re, 97 Westbrook v. Calaghan, 343 v. Miller, 24 West Jewell Tin Mining Co., In re, Little's Case, 230 Westmoreland v. Huggins, 196 Western Assce. Co. v. McLean, 173 Western Fair Assn, v. Huthinson, Western Nat. Bank v. Perez, 144 Western of Canada Oil Lands, &c., Co. In re, 202 Western Wagon, &c., Co. v. West, 249 Westhead v. Riley, 94 Westlake v, Abbott, 149 Westley v. Jones, 189 Westloh v Brown, 126, 309 Westoby v. Day, 251, 261 Weston v. Sneyd, 73, 107 v. Thomas, 308 Westover v. Turner, 112, 113, 137, Westwood v. Cowne, 344, 382 Wharton v. Naylor, 366 Wheeler v. Atkins, 197 v. Gibbs, 175 v. La Marchant, 192 Whidden v. Jackson, 107 Whiley v. Whiley, 148 Whimsell v. Giffard, 255, 318 Whipple v. Manley, 180, 181 Whistler v. Hancock, 233 Whitaker v. Izod, 191 White, Ex parte, 295 v. Brown, 214 v. Galbraith, 5, 59, 64, 78, 106, 346, 394 v. Garden, 83 v. Milne, 221, 864 v. Sharp, 11 v. Steele, 58 v. White, 252 Whitehead v. Burt, 111 v. Fothergill, 182 White Sewing Machine Co. v. Belfry, 77 Whitehouse, Ex parte, 260 v. Wolverhampton Ry. Co. 282

rch, 111 0., 51 gh, 277 Ry. Co., 192. B. W. Dist. . 343 g Co., In re, ins, 196 McLean, 173 Huthinson, Perez, 144 Lands, &c., Co. v. West, 9 , 309 261

07 112, 113, 137, 44, 382

5, 59, 64, 78, 394 364

11 ill, 182 ne Co. v. Bel-

, 260 rhampton Ry. Whitehouse v. Simons, 134 Whitely v. MacMahen, 284 Whitely Partners, Re, 78 Whitling v. Sharples, 69 Whittaker, Re. Christian v. Whit-

taker, 397 v. Kershaw, 394

Whitton, Ex parte, 24 Whitwood Chemical Co. v. Hardman, 93 Wickham v. Lee, 69, 103 Wicks v. Wood, 360 Widmeyer v. McMahon, 69, 76, 395 Wigens v. Cook, 179 Wilberforce v. Sowton, 220, 223 Wilcoxon v. Searby, 364 Wilde v. Sherridan, 110 Wilding v. Bean, 135 Wiley v. Crawford, 245 Wilhelmi v. Hafner, 248

Wilkes v. Buffalo, B. & G. Ry. Co. 151 Wilkins v. Casey, 277

v. Peatman, 362 Wilkinson v. Harvey, 299, 361 Willcock v. Terrell, 247 Willcocks v. Howell, 140 Williams, Ex parte, 209

v. Burgess, 118 v. Crow, 80 v. Evans, 165, 220 v. Grey 320, 359 v. Griffiths, 184 v. G. W. Ry. Co. 237

v. Jones, 219 v. Macdonald, 296 v. Mostyn, 245

v. Piggott, 135 v. Price, 386

v. Reeves, 247, 249 v. Richardson, 363 v Sibley, 97

Williamson v. Harvey, 299 v. McCrary, 389

v. Moggs, 135 Willing v. Elliott, 92, 393 Willis v. Ball, 135

v. Bull, 131 v. Grippe, 8 v. Mac Eachlan, 60

Willoughby v. Willoughby, 11 Willows v. Ball, 315

Wills v. Hopkins, 361 Wilmot v. Maitland, 92 v. Smith, 172

v. Wadsworth, 197 Wilson v. Brett, 204

v. De Coulon, 196

Wilson v. Corp. of Huron and Bruce, 170, 250, 283

v. Dundas, 250 v. Gabriel, 317 v. Hector, 120 v. Hutton, 208

v. McDonald, 199 v. McGuire, 20

v. Mun. Council of Port Hope, 149 v. Quarter Sess. of Huron

and Bruce, 377 v. Rastall, 353

v. Reid, 86

v. Roger, McLay & Co. 144

v. Rykert, 185

v. The Corp of Middlesex,

v. Uphill, 175 v. Vogt, 295 v. Wallani, 31

Wiltsie v. Ward, 58, 76, 107 Winfield v. Fowlie, 233, 358

Winger v. Sibbald, 104, 106, 148, 231 Wingrove, Re, 77

Winks v. Holden, 327 Winn v. Ingilby, 294

Winnipeg Water Wks. Co. v. Winnipeg St. Ry. Co., 225

Winsor v. Dunford, 58, 60 Winter v. Garlick, 286 Wintle v. Williams, 272

Wismer v. Wismer, 102 Withrow, Re, 248

Wolfe, Ex rel., v. Butler, 253 Wolmershausen v. Wolmershausen,

30, 184 Wolton v. Gavin, 13

Woltz v. Blakely, 41, 62, 327 Wood v. Dixie, 279

v. Dunn, 261, 272, 277 v. Foster, 19

v. Jones, 182 v. Joselin, 261, 279, 281

v. McAlpine, 128 v. Perry, 103 v. Roweliff, 92

v. Wood, 8, 295, 315 Wood & Ivery (Ltd.) v. Hamblet,

Woodgate v. Godfrey, 296 v. Knatchbull, 374 Woodhams v. Newman, 106 Woodruff v. McLennan, 155

Woods v. Rennett, Re, 64 Woolen v. Wright, 299

Woolford's Est. (Trustees) v. Levy,

Wooster Coal Co. v. Nelson, 148, 149 | Yorkshire Banking Co. v. Beatson, Working Men's Mut. Socy., In re, 189, 193

Workman v. Brady, 70 v. Robb, 49

Worley v. Glover, 130 Worsley v. Bissett, 168

Worthington v. Jeffries, 62, 63 Worts v. Worts, 16 Wright v. Arnold, 56, 102

v. Chard, 396 v. Court, 43

v. Hale, 392 v. McGuffie, 168

v. Mills, 150 v. Read, 172

v. Wilkin, 202

Wyslon v. Dunn, 78

Υ.

Yates v. Palmer, 58 Yates v. Rutledge, 365 Yea v. Lethbridge, 29 Yeatman v. Dempsey, 190, 245 Yorke v. Smith, 220 160, 215

Young, Ex parte, 144

Re, 9, 46, 55, 144, 145, 278 and Harston, Re, 136, 238, 329, 371

v. Brompton, 228 v. Buchanan, 295

v. Bulman, 11

v. Higgon, 24, 42, 215, 289, 350, 384, 385, 386

v. Holloway, 192

v. Kitchin, 97 v. Leng, 151

v. Morden, 59, 77 v. Parker, 145, 322

v. Proby, 28

v. Taylor, 166

Z.

Zaritz v. Mann, 58, 129 Zavitz v. Hoover, 216 Zilliaz v. Deans, 311 Zimmer v. G. T. Ry. Co., 241 Zohrab v. Smith, 60, 132 Zouch v. Empsey, 122 v. Beatson,

, 145, 278 Re, 136, 238,

ie, 100,

2, 215, 239, 5, 386

5, 386 2

77

322

Co., 241

LIST AND EXPLANATION OF ABBREVIATIONS.

A.

(1891) A. C.—Appeal Cases, Law Reports (England), 1891, etc. Add. on Con.—Addison on Contracts, 9th Ed. A & E.—Adolphus & Ellis's Reports, K. B., 1834-1840. Ala.—Alabama Reports. Alb. L. J.—Albany Law Journal. Ambl.—Ambler's Reports, Chancery, 1787-1784. Am. St. R. or Am. R.—American State Reports. Anst.—Anstruther's Exchequer Reports, 1792-1797. And. or Anderson—Anderson's Reports C. P., 1664-1665. App. Cas.—Appeal Cases, English H. L. and, Privy Council, 1875-1890] A. R.—Appeal Reports, Ontario, 1876 to date.

B.

B. & Ad.—Barnwell and Adolphus's Reports, K. B., 1830-1834.
B. & Ald. or A.—Barnewall and Alderson's Reports, K. B., 1817-1822.
B. N. A. Act—British North American Act.
B. & B.—Ball & Beatty, Irish Chancery Reports, 1807-1814.
B. & C.—Barnewall and Cresswall's Reports, K. B., 1822-1830.
Bac. Abr. Prohib.—Bacon's Abridgment, Title, "Prohibition."
Barb.—Barbour's Reports, New York Supreme Court.
Barnes.—Barnes' Notes, Common Pleas, 1732-1756.
Beav.—Beavan's Reports, Rolls Courts, 1838-1866.
Bang.—Bangham's Reports, C. P., 1822-1834.
Bing. N. C.—Bingham, New Cases, C. P., 1834-1840.
Biss.—Bissell's United States Circuit Court Reports.
B. & P.—Bosanquet and Puller, Common Pleas, 1796-1807.
B. N. P.—Buller's Nisi Prius.
Bro. C. C.—Brown's Chancery Reports, (Eden or Belt).
Brod. & Bing.—Broderick and Bingham, Common Pleas Reports, 1819-1822.
B. & S.—Best & Smith's Reports, Q. B., 1861-1870.
Buller's N. P.—Buller's Nisi Prius.
Bullstr.—Bulstrode's Reports, K. B., 1609-1639.
Burb.—Bunbury's Reports, Exchequer, 1713-1742.
Burbidge's Crim. Dig.—Burbidge's Criminal Digest, 1890.
Burr.—Burrow, Q. B. 1757-1771.

C.

C. A.—Court of Appeal.
Camp.—Campbell's Reports, Nisi Prius, 1808-1816.
C. B.—Common Bench Reports or Manning, Granger & Scott's Reports, 1845-1856.

C. B. N. S.—Common Bench Reports, new series, 1856-1865. Cal.—California Supreme Court. Cald.—Caldecott's Reports, Magistrate's Cases, 1786-1800. Car. & M.-Carrington & Marshman's Reports, Nisi Prius, 1840-1842. C. & J.—Crompton & Jervis' Reports Exchequer, 1830-1832. Cent. L. J.-Central Law Journal. 1891, 1 Ch.—Chancery Division Law Reports (England), 1891 etc. Cham. R.—Chambers Reports, Upper Canada, 1851-1852. Ch. Cham.—Chancery Chambers Reports, Upper Canada, 1852-1865. Ch. D.—Chancery Division, Law Reports (England), 1875-1890. Chitty-Chitty's Reports, 1820-1823. Chitt. Stats.—Chitty's Statues of Practical Utility. C. & E.—Cababe & Ellis' Queen's Bench Reports, 1882-1885. C. & K.—Carrington & Kirwan, Nisi Prius, 1840-1850. Cl. & F.—Clark & Finnelly's House of Lords Reports, 1831-1846. C. L. J.—Canada Law Journal, 1865 to date. C. L. R.—Common Law Reports (English), 1815-1865. C. L. T.—Canadian Law Times (occasional notes), 1880 to date. C. & M.—Crompton & Meeson's Reports, Exchequer, 1832-1834. C. M. & R.—Crompton, Meeson & Roscoe, Ex., 1834-1836. C. P.—Common Pleas Reports, Upper Canada, 1850-1881. C. & P .- Carrington and Payne Reports, N. P., 1813-1841. C. R.—Consolidated Rules of Practice. Col.—Colorado Supreme Court of Appeals. Conn.—Connecticut Supreme Court. Cranch—Cranch, United States Supreme Court, 1801-1815. Cro. Car.—Croke's Reports during reign of Charles I. Cromp. & J.—Crompton and Jervis' Reports, Ex , 1830-1832. Cromp. & M.—Crompton and Meeson's Reports, Ex., 1831-1834. C. S. U. C.—Consolidated Statutes of Upper Canada, 1856. Curt.—Curtis' United States Circuit Court, First Circuit. Cushing—Cushing's Reports, Massachusetts Supreme Court Reports.

D.

D. C. A.—Division Courts Act. Dears. C. C.—Dearsley's Crown Cases, 1852-1856. D. F. & J.-DeGex, Fisher & Jones, Chancery, 1851-1861. Deg. & S.—DeGex and Smale's Reports, Chancery, 1846-1852. D. & L.—Dowling and Lowndes, Bail Court Reports, 1846-1849. Den. C. C.—Denison's Crown Cases, 1850-1852. Divl. Ct.-Divisional Court. Dowl.—Dowling's Practise Cases, 1830-1840. Dowl. N. S.- Dowling, new series, 1841-1842. Doug.—Douglas' Reports, K. B., 1778-1784. D. M. & G.—DeGex, Macnaghten & Gordon's Reports, Chancery, 1853. D. & R. - Dowling and Ryland, K. B., 1821-1827. Dra.—Draper's K. B. Reports, Upper Canada, 1829-1831. Duv.-Duvall's Kentucky Court of Appeals. Dwar.—Dwarris on Statutes. Dow & Clark—Dow & Clark's House of Lords Cases. Dra.—Draper's Reports, Upper Canada, 18291-831.

E.

Fast - East's Reports, K. B., 1801-1812. E. & A. - Error and Appeal Reports, Upper Canada, 1846-1866.

ABBREVIATIONS.

E. & B.—Ellis & Blackburn's Reports, Q. B., 1852-1858.
E. B. & E.—Ellis, Blackburn & Ellis's Reports, Q. B., 1818.
East, P. C.—East's Pleas of the Crown, 1803.
E. & E.—Ellis & Ellis, Q. B., 1856-1860.
E. T.—Easter Term.
Esp.—Espinasse, Nisi Prius, 1793-1807.
Evans Prin. & Agt.—Evans on Principal and Agent.
Ex.—Exchequer Reports, 1847-1856.
Ex. D.—Exchequer Division, Law Reports (England), 1875-1880.

F.

Farr.—Farresley (7 Modern Reports). F. & F.—Foster and Finlason's Reports, Nisi Prius, 1858-1865. F. R.—Federal Reporter.

G.

Ga.--Georgia Supreme Court Reports. Giff.--Giffard's Reports, Chancery, 1860-1871. Gow.--Gow, Nisi Prius, 1818-1820. Gr.--Grant's Chancery Reports, Upper Canada, 1849-1881.

H.

Hale, P. C.—Hale's Pleas of the Crown.
Har. & W.—Harrison v. Wollaston's Reports K. B., 1835, 1836.
Hare—Hare's Report, Chancery, 1841-1853.
H. Bl.—Henry Blackstone's Reports, 1788-1796
H. & C. Hurlestone v. Coltman's Reports, Exchequer, 1862-1866.
H. L. Cas—House of Lords Cases (New Series), 1847-1865.
H. & M.—Hemming & Miller's Chancery, 1862-1865.
H. & M.—Hemming & Miller's Chancery, 1862-1865.
H. & N.—Hurleston's and Norman's Reports, Ex. 1836-1861.
Hodge's.—Hodge's Reports, Common Pleas, 1835-1837.
Hodgins' E. C.—Hodgins' Election Cases, 1871-1878.
Howard, Miss.—Howard's Mississippi Reports, 1834-1843.
Humphrey's—Humphrey's Tennessee Supreme Court Reports.
Hun.—Hun's Reports, New York Supreme Court.

T.

Ill.—Illinois Reports.
Inst.—Coke's Institutes of the Laws of England.
Iowa, R.—Iowa Supreme Court.
Ir. Cham.—Irish Chancery Reports, 1850-1866.
Ir. C. L.—Irish Common Law Reports, 1850-1866.
Ir. Eq.—Irish Equity Reports, 1838-1850.
Ir. L. R.—Irish Law Reports, 1838-1850.
Ir. R. C. L.—Irish Reports, Common Law Series, 1866, 1877.
Ir. R. Eq.—Irish Reports, Equity, 1866-1877.

J.,

Jac. —Jacob's Reports, Chancery, 1821-1828. J. A. Rule—Rules of the Ontario Judicature Act, 1881. Johns.—Johnson's Reports, Chancery, 1859. Jur.—Jurist Reports, 1837-1854.

1846.

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852-1865.

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t Reports.

834.

52. 1849.

ancery, 1853-

1866.

Jur. N. S.-Jurist, New Series, 1855-1866.

J. P.—Justice of the Peace.

J. W.—Jacob Walker's Reports, Chancery, 1819-1821.

K.

K. & J.—Kay and Johnson's Reports, Chancery, 1854-1858. Kansas-Kansas Supreme Court Reports.

L.

La. An.-Louisiana Annual, Supreme Court.

L. &. C.-Leigh and Cave's Crown Cases, 1861-1865.

L. C. G.—Local Courts Gazette, Upper Canada, 1865-1872.

L. J. Bky.—Law Journal, Bankruptcy, 1832 to date.

L. J. Chan.—Law Journal Chancery, (England), 1832 to date.

L. J. Ex.-Law Journal, Exchequer, 1832 to date.

L. J. M. C.-Law Journal, Magistrate's Cases, 1832 to date.

L. J. N. S.—Canada Law Journal, New Series, 1865 to date. L. J. Q. B.—Law Journal, Queen's Bench, 1832 to date. L. J. N.—New Jersey Supreme Court Reports.

L. M. P.—Loundes, Maxwell and Pollock's Rep. Bail Court, 1850-1851.

L. R. A. & E.—Law Reports, Admiralty and Ecclesiastical.

L. R. C. C.—Law Reports. Crown Cases Reserved.

L. R. Ch.—Law Reports, Chancery Appeals. L. R. C. P.—Common Pleas Law Reports, (England), 1865-1875.

L. R. Eq.—Equity Cases, Law Reports (England), 1865-1875.

L. R. Ex.—Exchequer Law Reports (England), 1865-1875.

L. R. Ir. L.—English and Irish Appeals, House of Lords.
L. R. Ir.—Law Reports, Ireland, 1878 to date.
L. R. Q. B.—Queen's Bench Law Reports (England), 1865-1875.
L. R. P. C.—Law Reports, Privy Council Appeals.

L. R. P. & D.—Law Reports, Probate and Divorce.

L. R. Sc. App.—Law Reports, Scotch Appeals.

L. T. N. S.—Law Times, New Series (English).

L. T. O. S.—Law Times, Old Series (English).

L. T. Jour.—Law Times Journal, 1843 to date.

Lush's Pract. - Lush's Practice.

M.

McClel. & Y.-McCleland & Younge, Exchequer Reports, 1825.

Mac. a. G.-Macnaghten and Gordon's Reports, Chancery, 1849-1851.

Macq.—McQueen's House of Lords' Cases, Scotch Appeals, 1851-1865.

Maine-Maine Reports Supreme Court.

Man. L. R.—Manitoba Law Reports, 1884 to date,

Marsh.—Marshall's Reports. C. P., 1813-1816.

Mass.—Massachusetts Supreme Court Reports.

M. & G.--Manning and Granger, C. P., 1840-1844.

M. & Sc.—Moore & Scott's Reports, Common Pleas, 1831-1834.

M. T.—Michaelmas Term.

Mich.-Michigan Supreme Court Reports

Mod.—Modern Reports, 1793-1796.

Moo. & M.—Moody and Malkin's Reports, N. P., 1827-1830. Moo. P. C.—Moore's Privy Council Cases, 1836-1861. Moo. P. C. N. S.—Moore's Privy Council Cases, New Series, 1832-1873.

Moo. C. C.—Moody's Crown Cases, 1824-1844.

Moore—Moore's Reports, C. P., 1817-1827.
M. & Rob.—Moody and Robinson's Reports, C. P., 1831-1844.
M. & S.—Maule and Selwyn's Reports, K. B., 1813-1817.
Morris—Morris on Replevin.
Mun.—Municipal Act.
Mun. Man.—Harrison's Municipal Manual, 5th Ed.
M. & W.—Meeson & Welsby's Reports, Ex., 1836-1847.

N.

N. B. Reps.—New Brunswick Reports, 1825 to date.
N. C.—North Carolina Supreme Court.
N. H.—New Hampshire Superior Court.
N. R.—New Reports by Bosanquet and Puller.
N. S. Reps.—Nova Scotia Reports, 1802 to date.
N. & M.—Neville & Manning's Reports, K. B., 1832-1836.
N. W. Rep.—North Western Reporter (N. S.), 1879-1886.
N. Y.—New York Court of Appeals.
N. Y. Supr. Ct.—New York Supreme Court Reports.
New Eng. Rep.—New England Reporter.

0.

Ohio—Ohio Supreme Court Reports.
O. R.—Ontario Reports, 1882 to date.
O. S.—Old Series of King's and Q. B. Reports, Upper Canada, 1834-1844.

Ρ.

(1891) P.—Probate Division Law Reports, England, 1891. Pa.—Pennsylvania Supreme Court Reports.
P. D.—Probate Division Law Reports, England, 1875-1890. Peake.—Peake's Reports, Nisi Prius, 1790-1812. Penn.—Pennington's New Jersey Supreme Court. Peters.—Peters' United States Supreme Court, 1827-1842. Pick.—Pickering's Massachusetts, Supreme Court Reports. P. R.—Practice Reports, Ontario, 1850 to date. Porter.—Alabama Supreme Court Reports. Price.—Price's Exchequer Reports, 1814-1824. P. Wm's.—Peere Williams' Reports, 1695-1735.

Q.

Q. B.—Adolphus & Ellis, Queen's Bench Reports, 'New Series, 1841·1852.
(1891) 1 Q. B.—Queen's Bench Law Reports, England, 1891, etc.
Q. B. D.—Queen's Bench Division, Law Reports, England, 1875·1890.
Q. B. Div. Ct.—Queen's Bench Divisional Court.

R.

R. & J.—Robinson & Joseph's Digest (Ontario).
Rep.—Coke's Reports, 14 Eliz. to 13 James I.
Roscoe's Crim. Evi.—Roscoe's Criminal Evidence, 11th Ed.
Rose.—Rose's Bankruptcy Reports, 1810-1816.
R. R.—Revised Reports, 1785-1850 (current).
R. S. C.—Revised Statutes of Canada, 1886.
R. S. O.—Revised Statutes of Ontario, 1887.
Russell —Russell on Arbitration, 7th Ed.
Ry. & M.—Ryan & Moody, Nisi Prius, 1823-1826.

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Series, 1862-1978.

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Salk.—Salkeld's Reports, Q.B., 1689-1712. Sayer.—Sayer's Reports, K.B., 1751-1756. S.C.—Same Case. S.C.R.—Supreme Court Reports, Canada, 1875 to date. Scott.—Scott's Reports, Common Pleas, 1834-1840. Sc. N. R.—Scott's New Reports, C. P., 1840-1845. Selwyn's N. P.—Sewlyn's Nisi Prius. Shortt .- Shortt on Mandamus. Sim-Simon's Reports, Chancery, 1826-1850. Sir T. Raymond.—Sir Thomas Raymond's Report, 1661-1684. Smiths L. C .- Smith's Leading Cases, 9th Ed. Sol. J.—Solicitor's Journal, 1857 to date. S. P.—Same point. S. & R.—Serjeant and Rawle's Pennsylvania Supreme Court Reports. S. & S.—Simon's and Stuart's Reports, Chancery, 1822-1826. Stark.—Starkie, Nisi Prius, 1815-1822. Step. Com.—Stephen's Commentaries. Stephen's Dig. Ev.—Stephen's Digest of Evidence, 2nd Ed. Str. or Strange.—Strange's Reports, K. B., 1716-1747. Stroud .- Stroud's Judicial Dictionary. Sw. & Tr.—Swabey & Tristam's Reports, Probate and Divorce.

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Taunt.—Taunton, C. P., 1808-1819.
Tay. R.—Taylor's Reports, Upper Canada, 1824-1828.
Taylor on Evid.—Taylor on Evidence, 8th Ed.
Texas.—Texas Supreme Court Reports.
T. L. R.—Times Law Reports, 1884 to date.
T. R.—Term Reports (Durnford & East), K. B., 1785-1800.
T. T.—Trinity Term.
Tyr.—Tyrwhitt's Reports, Exchequer, 1830-1835.

U.

U. C. L. J.—Upper Canada Law Journal (Old Series), 1855-1864.
U. C. R.—Queen's Bench Reports, Upper Canada, 1844-1881.
U. S. or U. S. Sup. Ct.—United States Supreme Court Reports, 1790 to date.

V.

Vern.—Vernon's Report's, Chancery, 1681-1720. Ves.—Vesey's (Sen.), Reports, Chancery, 1746-1755. Ves., Jr. or Jun.—Vessey's (Junior) Reports, Chancery, 1789-1816. Vt.—Vermont Supreme Court Reports.

W.

Wallace—Wallace's (U.S.) Supreme Court Reports, 1863-1874. W. Bl.—William Blackstone, K.B., 1746-1780. West. L. T.—Western Law Times. Whart-wharton's Reports, Pennsylvania Supreme Court. Wharton.—Wharton's Law Lexicon.

Wheat.—Wheaton, United States Supreme Court, 1827-1842.
Willes.—Willes's Reports, K. B. and C. P., 1737-1758.
Wils.—Wilson's Reports, K. B., 1742-1774.
Wilson's Jud. Acts.—Wilson's Practice of the Supreme Court of Judicature, 7th Ed.
Wis.—Wisconsin Supreme Court Reports.
W's Saund.—Saunder's Reports (Notes by Williams).
W. N.—Weekley Notes, England, 1865 to date.
W. R.—Weekley Reporter, in all the Courts, 1853 to date.
W. Va.—West Virginia Supreme Court of Appeals.

Y. & C.—Younge and Collyer, Exchequer Reports, 1834-1842.

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89-1816.

ADDENDA ET CORRIGENDA.

Page 12, line 15, for section 14, read section 8.

Page 22, at foot of page add reference to Re Louis. Ex parte, Incorporated Law Society, (1891), 1 Q. B. 641, held, that a person does not act as a solicitor by merely settling an affidavit for a person in his employ, and Apothecaries Co. v. Jones, (1893), 1 Q. B. 89, where it was held that the words "act or practise" were directed against an habitnal or continuous course of conduct.

Page 29, line 12, for "legal fees," read "illegal fees,"

Page 34, line 18, for section 37, read section 35.

Page 34, line 25, for section 37, read section 35.

Page 47, note to section 56 (a). 3 per cent. would be allowable under the tariff to the bailiff in case of settlement, but nothing on an assignment: Re Ludmore, 13 Q. B. D. 417. A sheriff is in a better position under C. R. 1233: Smith v. Antipitzky, 10 C. L. T. 368.

Page 55, line 25, add see Aldrich v. Aldrich, 13 C. L. T. 146, where it was held the Division Courts have jurisdiction upon a final judgment of the High Court, and may entertain a suit for \$100 in respect of costs of an alimony suit, the plaintiff expressly abandoning the excess of the taxed costs.

Page 56, line 4 from bottom, Re Thompson v. Hay, is reported at 22 O. R. 583, and has since been affirmed in appeal.

Page 57, line 32, for "in," read "on."

Page 59, line 39, Re Trimble v. Miller, is reported at 22 O. R. 500.

Page 65, line 14 from bottom, add Knight v. Lee (1893), 1 Q. B. 41.

Page 69, line 36, for "proper," read "paper."

Page 69, line 10 from bottom, in an action for taxes no question of prohibition can arise unless the defendant cannot be held liable without trying the question of title: Re Municipality of South Norfolk v. Warren, 12 C. L. T. 512.

Page 70, line 19, add Talbot v. Poole, 15 P. R. 99.

Page 71, line 7, in Talbot v. Poole, 15 P. R. 99, the Court of Appeal held that what is meant by custom is some legal custom by which the right or title to property is acquired or on which it depends.

Page 72, line 6 from bottom, for "Divisional," read "Division."

Page 75, line 16. The Division Court has no jurisdiction in an action for rent dependent upon the enforcement of an executory agreement for a lease, as the equitable doctrine, that a person who enters under an executory agreement for a lease is to be treated as in under the terms of the agreement, can only be applied where the court in which the action is

brought has concurrent jurisdiction in law and equity: Foster v. Reeves, (1892), 2 Q. B. 255.

Page 75, line 36, add Malcolm v. Leys, 15 P. R. 75.

Page 76, line 47, in reference to Trimble v. Miller, for "entitled," read "enured."

Page 77, line 36, for "42 L. J. U. C.," read "42 L. J. M. C."

Page 87, line 27, add. Kennin v. McDonald, 22 O. R. 484.

Page 91, line 11, add see Foster v. Reeves, (1892), 2 Q. B. 255.

Page 94, line 9, from bottom, after Trust and Loan Co. v. Gorsline, add, "In Holmes v. Millage. 9 T. L. R. 217, a receiver was appointed or unearned salary of the Paris correspondent of the London Daily Chronicle, but this has been reversed on appeal: 9 T. L. R. 331, W. N. (1893) 43

Page 97, line 20, add, see Roberts v. Booth, (1893), 1 Ch. 52.

Page 98, line 32, for "Town of Dunnas" read "Town of Dundas."
Page 110, line 29, after "them," add, Pattison v. Mills, and after "342," add, at page 363.

Page 113, line 40, for "Coleridge, C.J.," read "Coleridge, J."

Page 113, line 45, for "where" read "when."

Page 121, lines 31 and 44, Thompson v. Hay is reported at 22 O. R. 583.

Page 121, line 40, add, see 22 O. R. 586 (n.).

Page 122, line 6, Thompson v. Hay is reported at 22 O. R. 583.

Page 136, line 22, for "L. J. N." read "N. J. L."—New Jersey Supreme Court.

Page 155, line 35, see Bradley v. Chamberlyn, 9 T. L. R. 201; (1893), 1 Q. B. 439.

Page 155, line 36, for "had," read "has."

Page 157, line 22, for "Nelson v. Thomer," read "Nelson v. Thorner."

Page 157, line 35, for "no," read "not."

Page 159, line 25, add reference to Ford v. Harvey, 9 T. L. R. 328, where leave to defend was given unconditionally though a doubtful counter claim the only defence.

Page 159, line 34, add reference to Bowes v. Caustic Soda Syndicate, 9 T. L. R. 328, where leave to defend given unconditionally though defence was merely the proper construction of an agreement to pay.

Page 159, line 42, for "305," read "304."

Page 159, line 54, after Girvin v. Grepe, add "In Rotherham v. Priest, 49 L. J. C. P. 104, an affidavit in reply was allowed.

Page 161, line 19, for "issuing," read "borrowing."

Page 161, line 30, but a motion may be made after amendment: Paxton v. Baird, (1893), 1 Q. B. 139; Bradley v. Chamberlyn, 9 T. L. R. 201; (1893), 1 Q. B. 439.

Page 170, line 3 from bottom, add R. v. Marylebone C. C. 34 Sol. J. 459. Page 171, line 13 from bottom, for "Huson," read "V. Hudon."

Page 177, line 22, after Archer v. English, add Hennell v. Davies (1893), 1 Q. B. 367.

Page 191, line 2, for "Re Freshton," read "Re Freston."

Page 191, line 13, for "Howick," read "Hornick."

Page 191, line 14, for "Harding v. Kraust," read "Harding v. Knust," 15 P. R. 80.

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Court of Appeal m by which the ids. Division."

ion in an action agreement for a under an execuhe terms of the ch the action is Page 191, line 16, for "by the evidence," "by other evidence."

Page 191, line 19, for "version," read "occasion."

Page 206, line 2 from bottom, for "judiciously" read "judicially."

Page 208, line 17, add "unless sworn out of the province, when they may be sworn before any of the persons enumerated in R. S. O. c. 61, s. 34."

Page 208, line 7 from bottom, Forbes v. Michigan Central Ry. Co. is reported in 22 O. R. 568. *Re* Wilson v. Hutton is noted in 13 C. L. T. 43, and reported 23 O. R.

Page 208, line 6 from bottom, Re Wilson v. Hutton is noted 13 C. L. T. 48.

Page 221, line 39 for "Angel v. Braddeley" read "Angell v. Baddeley."

Page 238, line 21, for "presented" read "prescribed."

Page 249, line 9 from bottom, for "direction" read "discretion"

Page 255, line 2, after "supra" add R. v. Marylebone, C. C. 84 Sol. J. 459.

Page 261, at foot, Re Hanna v. Coulson, 4th May, 1893, it was expressly held that a garnishee was examinable on judgment summons.

Page 268, line 25, read "Formerly the wages of, etc."

Page 279, line 13, Re Perras v. Keefer, is reported 22 O. R. 672.

Page 282, line 10, Gould v. Hope was reversed on appeal, 13 C. L. T. 154.

Page 289, line 2, add, "but in Parke v. Willcock, Feb. 16th, 1893, it was held that a confession of judgment in a Division Court came within the express terms of R. S. O. c. 124.

Page 299, line 18, for "Williamson" read "Wilkinson"

Page 303, note to section 212 (b). The fees would not include poundage: Re Ludmore, 13 Q. B. D. 417.

Page 314, line 38, add "a sale of the equity of the goods mortgaged is void: Goold v. 4 Ch. Chamb.

Page 315, line 3, Gould v. Hope, was reversed appeal, 13 C. L. T. 134.

Page 373, at foot of page, add "In Clarke v. Moore, 94 L. T. Jour. 390, it was held that seizing exempted goods was misconduct entitling the debtor to recover damages from the bailiff under this section.

Page 384, at foot of page for "Cherrier" read "Obernier."

Page 385, line 7 " Mason v. Kensington Vestry" read " Madden v. Kensington Vestry."

Page 393, line 8 from bottom, add "but see Wood v. Leetham, 61 L. J. Q. B. 215, where it is said the practice of the High Court of Justice is to be followed where not inconsistent.

THE DIVISION COURTS ACT

OF THE PROVINCE OF ONTARIO,

BROUGHT INTO FORCE ON THE 31st DAY OF DECEMBER, 1887,

And Amendments thereto.

CHAPTER 51.

An Act respecting the Division Courts.

[31st December, 1887.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act may be cited as "The Division Courts Short title. Act." R. S. O. 1877, c. 47, s. 1.

The Division Courts Act.—By the Statute of 4 and 5 Vic. c. 53, what was then known and used as a means of collecting small debts, the Court of Requests, was abolished, and was supplanted by what has since been known as the Division Court.

2. In the construction of this Act, "County" shall Interpreinclude two or more counties united for judicial purposes; "County." and in any form or proceeding the words "United Counties" shall be introduced where necessary. R. S. O. 1877, c. 47, s. 2. Sections 2-6 This is in effect a repetition of s. 8, s-s. 12, R. S. O. 1887, ("Interpretation Act").

"County" means a portion of territory set apart for municipal not electoral purposes: R. v. Shavelear, 11 O. R. 727.

THE COURTS.

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3. The Division Courts, and the limits and extent thereof existing at the time this Act takes effect, shall continue until altered by law. R. S. O. 1877, c. 47, s. 3.

This Act came into force on 31st Dec., 1887, by proclamation under the provisions of "An Act respecting the Revised Statutes of Ontario, 1887," 50 Vic. c. 2.

As to the alteration of the limits of Division Courts in any county or union of counties, see sections 13, 14, 15 of this Act.

Number of Courts in counties, cities, and towns.

4. There shall not be less than three or more than twelve Division Courts in each county, of which Division Courts there shall be at least one in each city and county town. R. S. O. 1877, c. 47, s. 4.

In each county.—Or union of counties, as the case may be. Should there be a city in any county, other than that in which the Court house is situated and the Assizes are held (The Mun. Act, s. 2, s-s, 6), a court would necessarily have to be established there. The word "city" here might be considered as equivalent to "County Town," but it is submitted that its meaning should not be so restricted. There must be not less than three Division Courts in any county. There cannot possibly be more than twelve even under section 14. Whatever the number may be there must be one in each city and one in each county town.

Designation of Court. 5. The Court in each division shall be called "The First Division Court in the County of ," (or as the case may be). R. S. O. 1877, c. 47, s. 5.

As the case may be.—Usually numbered consecutively, commencing with that in the County Town as Number One: 7 U. C. L. J., 147.

Each Court to have a seal.

6. Every Division Court shall have a seal with which all process of the Court shall be sealed or stamped, and such seal shall be paid for out of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 6.

A Seal.—"The ommon law intended by a seal, an impression upon wax or paper or some other tenacious substance capable of being impressed," per Kent, C. 4, Comm. 9th Ed., 452.

"Neither wax, paper nor other adhesive substance is now required," Re Bell & Black, 1 O. R. 125, 126.

"There must, I take it, still be something affixed to or impressed upon the document denoting that it is intended as a seal," per Spragge, V.C., Hamilton v. Dennis, 12 Gr. 328; Re Croome & Brantford, 6 O. R.

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judicial notice of: Doe d. Duncan v. Edwards, 9 A. & E. 554.

The seals usually adopted by Division Court clerks, by which an impression is made on the process issued from their courts, shewing the number of the court and county in which it is, without any wax or other foreign substance, are no doubt valid and within this clause of the statute: Ont. Salt Co. v. Merchants Salt Co., 18 Gr. 551.

Process.—" Process" means in the interpretation of the Rules of Court, "any summons, writ or warrant issued under the seal of the court or Judge's summons or order," Rule 2. But in this section it cannot properly be applied to Judge's summons or orders. That which may be done without the aid of the court is not a "Process:" Stroud, 618

Sealed or Stamped.—Without a seal the process would be irregular and liable to set aside (see Smith v. Russell, 1 Cham. R. 193), unless an amendment were allowed, which should be done as a matter of course; the mistake being a misprision of the clerk: Cheese v. Scales, 10 M. & W. 488; see also Rule 118.

Consolidated Revenue Fund.—Applications for seals should be made to the Inspector of Division Courts, by whom accounts are certified and sent to the Provincial Treasury for payment.

7. The Division Courts shall not be held to constitute Not to be Courts of Record, but the judgments in the said Courts Record. shall have the same force and effect as judgments of Courts of Record. R. S. O. 1877, c. 47, s. 7.

Courts of Record.—Courts of Record are defined to be those "where the judicial acts and proceedings are enrolled for a perpetual memorial and testimony; which rolls are called records of the court, and are of such high and super-eminent authority that their truth is not to be called in question:" Wharton, 620.

EFFECT OF JUDGMENT.

Res Judicata.—Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case actually decided by the court and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered, which is excluded in the action in which that judgment is intended to be proved: Stephen's Dig. Ev. Art. 41. All that was essential to the decision may be taken to be conclusively determined: Concha v. Concha, 11 App. Cas. 541. A judgment in a Division Court is a bar to an action on the same subject matter in any other court: Austin v. Mills, 9 Ex. 288, but the causes of action must be the same as if a judgment be recovered for personal injuries, it is no bar to an action for injury to property, real or personal, arising out of the same act: Brunsden v. Humphrey, 14 Q. B. D. 141.

A judgment against one of two or more debtors or joint contractors is, though unsatisfied, a bar to any action brought against others upon the joint contract or for the joint debt: King v. Hoare, 13 M. & W. 494;

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Kendall v. Hamilton, 4 App. Cas. 504; Cambeport v. Chapman, 19 Q. B. D. 229; Hammond v. Schofield, (1891) 1 Q. B. 453, and this is so even though one of the contractors is a married woman liable only in respect of her separate estate: Hoare v. Niblett, (1891) 1 Q. B. 781; and a judgment against an agent would be a bar to an action against the principal in respect to the same debt: Scarf v. Jardine, 7 App. Cas. 345; Curtis v. Williamson, L. R. 10, Q. B. 57, and in such a case the court will not allow the plaintiff to vacate his judgment: Toronto Dental Mfg. Co. v. McLaren, 14 P. R. 89.

But if a judgment be given for the defendant in whole or in part, the right to succeed in a new action depends upon the course of the former action. If that action should have been discontinued or dismissed for want of prosecution, it would form no bar: Roberts v. Lucas, 11 P. R. 3. If the plaintiff offered no evidence on the prior action on a particular part of his claim, then a new action may be brought for such part; but if he does offer evidence and fails, he is prevented from bringing a fresh action: Stafford v. Clark, 2 Bing. 377; Hadley v. Green, 2 Cromp. & J. 376. If the action should have failed because prematurely brought, or for want of privity, it would form no bar to recovery in the second action; Chisholm v. Morse, 11 C. P. 589; Heming v. Wilton, 5 C. & P. 54; Palmer v. Temple, 9 A. & E. 508; Re Donovan. Wilson v. Beatty, 29 Gr. 280; but, subject to exceptions, the general rule is, that where the cause of action is the same and the plaintiff has an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action: Nelson v. Couch, 15 C. B. N. S. 108; Davidson v. Belleville & North Hastings Ry. Co., 5 A. R. 315.

A defendant against whom a judgment is recovered is estopped from denying the indebtedness found to be due by the judgment: Boileau v. Rutlin, 2 Ex. 665. The defendant must take every defence open to him in the action, and if he omits to do so before judgment, he cannot do so afterwards: Howlett v. Tarte, 10 C. B. N. S. 813; Cochrane v. Hamilton Prov. & Loan Socy., 15 O. R. 128; and if money be paid under compulsion of legal process, it cannot be recovered back: Marriott v. Hampton, 3 Smith's L. C. 1686; 4 R. R. 439, even by showing that a sum had been paid for which no credit was given: Sorenson v. Smart, 5 O. R. 678.

But if the judgment has been obtained by an untrue statement of facts: i.e. by fraud, it is not a valid judgment: Magurn v. Magurn, 11 A. R. 178; see 6 C. L. T. 157, "Fraudulent and Collusive Judgments."

Interest.—A judgment of a Court of Record bears interest, R. S. O. c. 44, s. 88; and, therefore, a judgment of a Division Court, under this section, also bears interest. The decision in R. v. Cy. Ct., Judge of Essex, 18 Q. B. D. 704, deciding that County Court judgments in England do not bear interest, is, therefore, inapplicable in this Province.

Action.—A judgment creates a specialty debt, and is enforceable by action: Hodsoll v. Baxter, E. B. & E. 884; and a judgment of a higher Court may be enforced by action in the Division Court: Eberts v. Brooke, 11 P. R. 296. Actions on judgments are not to be favored as there is another remedy for enforcing them: Biddleson v. Whitel, 1 W. Bl. 507; and costs will not be allowed: Philpott v. Lehain, 35 L. T. N. S. 855; unless other and distinct causes of action are added: Jackson v. Everett, 1 B. & S. 857.

Limitation.—An action is not maintainable upon a judgment over twenty years old without a payment or acknowledgment in the meantime: R. S. O. c. 60, ss. 1 and 8; Chard v. Rae, 18 O. R. 371; but the rights of the plaintiff are not barred until twenty years have elapsed: Allan v. McTavish 2 A. R. 278; Boice v. O'Loane, 3 A. R. 167; and

a revivor gives a new starting point to the statute: McCullough v. Sykes, Sections 11 P. R. 337.

If execution is issued on the judgment within six years, there is no necessity of revival within twenty years: Jenkins v. Kerby, 2 L. J. N. S. 164; but if no execution be issued within such period, an application to the Judge is necessary for leave, unless a payment has been made within twelve months before issue of execution: see Rule 156. Such leave will not be given, unless the application be made within twenty years: McMahon v. Spencer, 13 A. R. 430; even though an execution may in the meantime have been issued thereon: Price v. Wade, 14 P. R. 351.

Upon a foreign judgment an action must be brought within six years: North v. Fisher, 6 O. R. 206.

It was held, in Berkeley v. Elderkin, 1 E. & B. 805, and Austin v. Mills, 9 Ex. 288, that no action was maintainable in a Superior Court on an English County Court judgment. The authority of these cases was recognized by the English Court of Appeal in Bailey v. Bailey, 13 Q. B. D. 855; R. v. Cy. Ct. Judge of Essex, 18 Q. B. D. 706. They were followed in McPherson v. Forrester, 11 U. C. R. 362, and Donnelly v. Stewart, 25 U. C. R. 398, where our Court of Queen's Bench held that no action would lie in any Superior or County Court on a Division Court judgment. The last case was decided in 1866. At that time the section simply enacted that Division Courts should not be held to constitute Courts of Record: C. S. U. C. c. 19, s. 5; but the concluding words of the section were introduced in 1869. If the same point were again to come up for decision the result might, therefore, very well be different.

It seems clear that a Division Court is not a Court of Record notwithstanding Corsant qui tam v. Taylor, 10 L. J. N. S. 320; see Farr v. Robins, 12 C. P. 35. A judgment may be recalled and a term imposed or a change made at any time before a judgment found is entered: Canadian Land & Emigration Co. v. Dysart, 9 O. R. 495, 512; but after the Judge has entered a judgment, he cannot alter same, except by consent or on an application for or after a new trial; Irving v. Askew, L. R. 5 Q. B. 208.

8. A court shall be holden in each division once in Time and every two months, or oftener in the discretion of the holding Courts. senior or the acting County Judge; and the Judge may appoint and from time to time alter the times and places within such divisions, when and at which such courts shall be holden. R. S. O. 1877, c. 47, s. 8.

Each division.—Except in cities where there are two Division Courts, the sittings of the court and the clerk's office must be within the division.

Every two months .-- A substantial compliance with this section would be the holding of a sitting in each division six times during the year, as nearly as possible at regular intervals. See section 12, post.

Discretion means "according to the rules of reason and justice, not private opinion"; Lee v. Bude Ry. Co., L. R. 6 C. P. 576; Rooke's Case, 5 Rep. 103 (a); "not capriciously, but on judicial grounds and for substantial reasons": per Jessel, M.R., re Taylor, 4 Ch. D. 160; Stroud, 216. See also notes to section 175, post, "opinion of the Judge."

The Judge cannot be compelled by mandamus to exercise his discretion. to permit an amendment: In re White v. Galbraith, 8 C. L. T. 309.

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ceable by a higher v. Brooke, s there is Bl. 507; N. S. 855; ackson v. Sections 8.9 In cities and towns there are usually required more than six sittings a year, and any additional number which the business may render necessary is left to the discretion of the Judge.

Within such divisions.—See note on "each division," supra. It may be found necessary for the Judge to alter the time and place of holding a court. The place of holding the court should be changed as seldom as possible, as questions of jurisdiction may frequently arise which have to be determined by reference to the place of sitting. See section 82.

"In determining, then, where the sittings of the court are to be held, it becomes necessary to ascertain what building accommodation can be secured for the decent and orderly conduct of business. If a town or township council chamber, school house, or other public building in a division, will be placed at the disposal of the officers of the court on court days, lighted and warmed as occasion requires, it should be chosen. The appointment of two places in a division for holding the court alternately seems warranted by the very broad language used in section 6 (now section 8). And although such an arrangement tends to produce errors and confusion in the business, cases may occur where the public convenience can possibly be served by shifting the places of sitting from one place to another and back again. It will be seen from the foregoing consideration that no general rule can be proposed as to the place where the sittings of a court should be held in a division; the question as it arises in each case must be settled with reference to the particular circumstances involved": 7 U. C. L. J. 312.

Toronto.—By 54 Vic. c. 15, s. 3, it is provided :-

3. There shall be in each of the courts of the two divisions of the City of Toronto, known as the First and Tenth Division Courts of the County of York, at least weekly sittings, except during the month of August, for the trial of causes; and in each of the said two Division Courts at least nonthly sittings for the hearing of judgment summonses; and also sittings at least every two months for the trial of cases where juries have been demanded. The Judges or any two of them, of whom the senior judge shall be one, may appoint additional sittings for any of the above purposes; and the Lieutenant-Governor in Council also shall have authority to appoint other sittings for any of the said purposes.

Holding Courts in cities. 9. Notwithstanding anything contained in this Act, or any of the general rules in force in the Division Courts of this Province, in any city in which two Division Courts are established or held, all or any of the sittings of both of such Courts may be appointed and held in any of such divisions, and both clerks of such Courts may, with the approval of the Lieutenant-Governor in Council, have and keep their offices in the same division in such city. 43 V. c. 8, s. 41.

The Municipality: See sec. 8.—In cities where two courts are established, the court house was found to be the most convenient place in which to hold division as well as other courts. This clause, therefore, allows both courts to be held in one place, but it is not compulsory. The clerks may also, with the approval of the Lieutenant Governor in Council, have their offices in the same division. The sittings of such

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are estabent place ise, therempulsory. vernor in s of such courts may be held in either division. Should the sittings of any Sections other court at the court house interfere with the holding of the Division Court there, it could be held at any place either in that or the other division, as might be found most convenient.

10. (1) The municipality in which a Division Court Courts is held shall furnish a court room and other necessary accomaccommodation for holding said Court, not in connection with an hotel.

(2) In case a proper court room, and other necessary If there be accommodation for the holding of the Division Court are Court room etc., the not furnished by the municipality in which the Court is Judge may held, the Judge may hold the Court in any suitable place in any suitable place able place. in the division, or in any other division of the County in which suitable accommodation is provided; and the owner, lessee or tenant of the building in which the Court is so held, shall be entitled to receive from the municipality Expenses whose duty it was to provide proper accommodation for for rent. the Court, the sum of \$5 for every day on which the Court is held in the building. R. S. O. 1877, c. 47, s. 9.

(3) Where a municipality, not being a town or city, Judge to furnishes a court room and other necessary accommodation cost in for a Division Court as aforesaid, or pays any owner, lessee cases. or tenant for the use of any building, it shall be entitled to recover from any other municipality, wholly or partly, within the division for which such Court is held, such reasonable share of the cost of providing accommodation for holding the Court as shall in that behalf be decided and ordered by the Judge of the said Court, to be paid and contributed by the latter municipality; and in every such case the total cost of providing such accommodation for holding the Court shall be deemed to be \$5 for every day on which the Court is held. 48 V. c. 14, s. 12.

The Municipality.—See "The Municipal Act," R. S. O. c. 184, s. 7.

Necessary accommodation. - What is "necessary accommodation" cannot be particularly defined, for in a city better accommodation would be expected than in a thinly-settled part of the country; but it might in general terms be said that proper and becoming provision for the comfort and convenience of those attending court, which, under the particular circumstances of a municipality, its council would be expected to provide for that purpose. It includes heating and lighting and suitable Section 10

accommodation for seating the officers of the court, professional gentlemen, litigants and others attending court.

An hotel.—The propriety of this provision is evident. Probably a Judge would feel warranted in holding that not only does the section prohibit the holding of courts at licensed houses, but at all taverns, inns, or houses of public entertainment.

In which the Court is held.—Where one division comprises more than one municipality there was originally no provision for making any other than that in "which the court is held" contribute a share of the expenses. But this omission has been supplied by sub-section 3, which now makes provision for such a case.

Accommodation is provided.—This is an exception to the rule requiring courts to be held within their division, according to section 8. Sub-section 3 provides for payment by each municipality, wholly or partly within the division for which the court is held, of its share of the cost of providing accommodation for holding the court, but it does not apply when the court is held without the division. Without this provision, the only course to compel a delinquent municipality to fulfil its duty in this respect would be by mandamus: Dark v. Municipal Council of Huron and Bruce, 7 C. P. 378. Where a statute compelled a municipality to afford suitable accommodation to a County Attorney and Clerk of the Peace, it was held that an action was maintainable for the expenses he incurred in consequence of the default of the Municipal Council: Lees v. The Corporation of the County of Carleton, 33 U. C. R. 409.

\$5 for every day.—The right being statutory no more than this sum could, under any circumstances, be recoverable: 33 U. C. R. p. 419.

Day on which the Court is held.—See notes to sub-section 2, supra.

Sub-section 3.—Provision is here made by which each municipality forming part of a division may be compelled to bear a fair and proper share of the expense of furnishing the requisite accommodation for holding the sittings of the court in the division. The section does not apply to city or town municipalities. Before the municipality seeking contribution under the statute for money disbursed by it, from the other or others, the expenses should be first paid. Anything short of that would not give the right of action. The payment, too, must be made to the owner, lessee, or tenant of the building in which the court is held.

What a "reasonable share" of the cost of providing the accommodation is, must depend on circumstances. The Judge of the court is to determine this, and to make his order accordingly. It could not be done ex parte. The municipality which is called upon to contribute would have the right to be heard, and to show cause why it should not pay the claim preferred: see notes to sections 133, 141, 147, and 183. Reference may also be made to Willis v. Gripps, 5 Moo. P. C. 379; R. v. Cheshire Lines Committee, L. R. 8 Q. B. 344; Wood v. Woad, L. R. 9 Ex. 170; R. v. Collins, 2 Q. B. D. p. 36; Fisher v. Keane, 11 Ch. D. 353; Ex p. Tucker. In re Tucker, 12 Ch. D. 308; R. v. College of Physicians and Surgeons, 44 U. C. R. 146; Tunbridge Wells Local Board v. Akroyd, 5 Ex. D. pp. 201, 204, 211; Briggs v. Briggs, 5 P. D. 163; R. v. Law, 27 U. C. R. 260.

The outside limit which all of the municipalities would be called upon to pay as the total cost is \$5 per day, but part of a day would count as one, no provision being made for a fractional part of a day. The sum which each would have to pay would be small, yet the proportion should, if possible, be settled upon some principle of fair contribution. It is submitted that the population and assessed value of the whole or parts of the respective municipalities within the division would be a fair basis on which to estimate the reasonable share of each.

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No particular mode of collecting the amount due by the delinquent Bections municipality is prescribed, and in the absence of such, it would seem that the proper proceeding would be an action in the Division Court: Lees v. Corp. of Carleton, 33 U.C.R. 409, and authorities there cited: Richardson v. Willis, L. R. 8 Ex. 69. The order of the Judge is not the order of the court; he is merely persona designata: Re Pacquette, 11 P. R. 463; Re Young, 14 P. R. 303; Re Rush, 10 C. L. T. 184.

11. The sittings of the Division Court in a county Use of Court town may be held in the county court house, and in the House. cases of cities and towns separated from the county, the use of the court house for such purpose may be taken into account in settling the proportion of the charges to be paid by the city or town for the maintenance of the court house. 43 V. c. 8, s. 42.

County Court House.—This section gives the right to the Judge to hold the sittings of any Division Court in the county town at the court house: Maxwell on Stats.; R. v. Oxford (Bishop), 4 Q. B. D, at p. 553. The right could not be held to interfere with the sittings of courts of higher jurisdiction.

Maintenance of the Court House .- As to the manner of settling such differences, see Harrison's Mun. Man., p. 342 and following pages.

12. If the Justices of the Peace for any County, in The Lieu-General Sessions assembled, certify to the Lieutenant-Governor General Sessions assembled, certify to the Lieutenant-may, in Governor that in any Division of the county, from the certain cases, amount of business, remoteness or inaccessibility, it is ex-regulate holding of pedient that the court should not be held so often as once Courts. in every two months, the Lieutenant-Governor in Council may order the court to be held at such periods as to him seems meet, and may revoke the order at pleasure, but a court shall be held in the Division at least once in every C. S. U. C. c. 19, s. 7; 38 V. c. 12, s. 1. six months.

In General Sessions assembled.—That is the sittings "commencing on the second Tuesday in the months of June and December respectively in each year," R. S. O. c. 48, s. 4. It must be done during the Sessions: In re Coleman, 23 U. C. R. 615. Three things must be established to the satisfaction of the Lieutenant-Governor in Council to justify his acting under this section: (1) The amount of business; (2) remoteness; (3) inaccessibility of the Division Court. See notes to sec. 138 post.

"If, then, the particular locality would furnish only a few cases in the year, or is far away from the business part of the county, or from want of roads or other causes, is accessible by the ordinary modes of conveyance only in midsummer or in sleighing time, these or any one of these facts would form grounds for a certificate under the section, and two or all three of them prevailing, would shew the inexpediency of holding more than two courts in the year. To occupy the Judge's time in holding such courts, would be to provide for the possible accommodation of

sections the few at a certain loss to the many. The power conferred on the Justices under this section, like all powers in law, must be duly executed at the time, and in the manner, and to the extent prescribed by the statute, and Magistrates have no authority out of the Act in respect of the Division Courts. So that if the power be not duly followed up in any act or order of Session, it would be without authority, and so void:"

7 Ŭ. C. L. J. 177-178.

- 13. (1) The County Judge, the sheriff, the warden of the County, and the Division Court inspector may, subject to the restrictions in this Act contained, appoint, and from time to time alter, the number, limits and extent of every division, and shall number the divisions, beginning at number one, but no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind, or that application will be made to alter or rescind is made and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace.
- (2) The Judge shall cause the sheriff, warden and inspector to be notified of any application, and of the time and place at which the same will be considered. 49 V. c. 15, s. 1.
- [(3) In Provisional Judicial Districts the powers conferred upon the County Judge, the sheriff, the warden of the County and the Division Court inspector, under section 13 of *The Division Courts' Act*, shall be exercised by the District Judge, the sheriff and the Division Court inspector for all the purposes referred to in the said section. 52 V. c. 12, s. 3,1

Formerly any alteration in the number, limits, and extent of any Division Court, could only be made by the Justices of the Peace for each county in General Sessions assembled. The power is committed by this section to those officers named in the section.

At first sight, it may seem that the tribunal here created may make one change without the necessity of making proclamation of the intention at the next previous sittings of the General Sessions of the Peace. It will be observed that the provisions as to notice more particularly refers to a "resolution or order made under the provisions of this section."

Whatever doubt there may be in respect to the necessity for "public notice of the intention to alter or rescind" being given, questions should be saved in all cases where the limits and extent of divisions are already established, by adopting the safer course and requiring it to be done; and there can be no doubt that the spirit of the law will be best observed by

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· " public ns should e already one; and served by the tribunal here constituted requiring evidence of the public notice **Sections** having been given by proclamation, before acting under this section.

When all preliminary requirements have been observed, the Judge should cause notices to be given to the other members of the tribunal, of the time and place at which any application will be considered. Parties making the application, and those opposing it, should be duly notified of the time and place of hearing. See notes to s. 10, s-s. 3. It is submitted, too, that in all cases there should also be public notice so that all parties interested or affected, or that might be affected by the proposed change, should have an opportunity of being heard before any decision is arrived Where the statute requires notice to be given of the proposed change mentioned in this section, any decision in respect to the same would be invalid in the absence of such notice: In re Birdsall v. The Corp. of Asphodel, 45 U. C. R. 149; R. v. Court of Revision of Cornwall, 25 U. C. R. 286; Re McGregor v. Norton, 13 P. R. 223.

The giving and proclamation of notice are conditions precedent to the making of any resolution or order affecting the limits and extent of any division: In re Meyers and Wonnacott, 23 U. C. R. 611; Griffiths v. The Municipality of Grantham, 6 C. P. 274; Shaw v. The Corp. of Manvers, 19 U. C. R. 288; Askow v. Manning, 38 U. C. R. 349. The notice should set out particularly the changes or alterations proposed, and the "limits and extent " of each division to be affected by it: Haacke v. The Municipality of Markham, 17 U. C. R. 562; In re Simmons v. The Corp. of Chatham, 21 U. C. R. 75; The Chief Superintendent, In re Shorey v. Thrasher, 30 U. C. R. 504.

The notice and its proclamation should be carefully entered by the Clerk of the Peace in a book to be kept by him, so that in the event of any change being made there would be a record of what was done, also that there might be proper evidence of a compliance with the terms of the statute. The order making the alteration proposed need not recite the notice: In re Ness and The Mun. of Saltfleet, 13 U. C. R. 408, but it would be better to do so. The order should follow the notice in defining "the limits and extent" of the divisions affected by it.

The decision of a majority of the members of the tribunal would be good: R. S. O. c. 1, s. 8, s-s. 34; In re Ontario and Quebec, 6 L. J. N. S. 212; but in order to justify a decision by less than the whole number who heard the question, there should first be an opportunity for a full discussion and a final refusal to agree: Goodman v. Sayers, 2 J. & W. 249; Dalling v. Matchett, Willes, 215; In re Morphett, 2 D. & L. 967; Young v. Bulman, 13 C. B. 623; White v. Sharp, 12 M. & W. 712; Thomas v. Harrop, 1 S. & S. 524; In re Pering v. Keymer, 3 A. & E. 245; In re Templeman and Reed, 9 Dowl. 962; Hawley v. North Staffordshire Ry. Co., 2 DeG. & S. 33; Willoughby v. Willoughby, 9 Q. B. 923.

Neither one could delegate his authority: Harrington v. Edison, 11 U. C. R. 114; Haskins v. St. Louis and S. E. Ry. Co., 109 U. S. Sup. Ct. 106.

14. (i) The Judge of a County Court may, in his Establishment by discretion, upon the petition of the Municipal Council of the County Judge of a any township or united townships in which no Division Court in Court has already been established, praying that a Division Townships on petition Court may be established in and for such township or of Township Coununited townships, establish and hold a Division Court oil.

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therein, and the court so established shall be numbered and called the Division Court of the county in which such township or united townships is or are situated, taking the number next after the highest number of the courts then existing in such county.

Court must be con-firmed by Lieutenant-Governor

(2) No business shall be transacted in such court until after the establishment thereof has been certified by the County Judge to the Lieutenant-Governor in Council. in Council together with the petition praying for the same, nor until after an order has been passed by the Lieutenant-Governor in Council approving thereof. R. S. O. 1877, c. 47, s. 12.

> Discretion.—It is not compulsory upon the Judge, but no doubt he would "establish" a Division Court under this section, where the public interests require it. The "discretion" should not be capriciously exercised: see notes to section 14, ante.

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Township.—This is a corporate act of the Municipal Council, and should be adopted at a regular meeting, or at a special meeting duly convened for the purpose, of which due notice should be given: R. v. Hill, 4 B. & C. 441, per Bayley, J., and should be properly attested by the corporate seal: Grant on Corporations, 55.

Sub-sec. 2.—The Court as such is not complete until its executive officers are appointed by the Lieutenant-Governor; see section 27, and no business can be transacted until then.

On separation of junior from senior county, Courts to continue same till altered by Sessions.

15. Where a junior county separates from a senior county, or union of counties, the Division Courts of the united counties which were before the separation wholly within the territorial limits of the junior county, shall continue to be Division Courts of the junior county, and all proceedings and judgments shall be had therein, and shall continue proceedings and judgments of the said Division Courts respectively; and all such Division Courts shall be known as Division Courts of such junior county by the same numbers respectively as they were before, until the Judge of the County, the sheriff, the warden of the county and the inspector of the Division Courts, appoint the number, limits and extent of the divisions for Division Courts within the limits of such junior county, as provided in section 13 of this Act. R. S. O. 1877, c. 47, s. 13; 49 V. c. 15, s. 2.

Senior County .- This is the county in which the court house and gaol are situated: Municipal Act, s. 36.

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Proceedings.—Taxation of costs would be a "proceeding" under this section: R. v. London, C. & D. Ry. Co., L. R. 3 Q. B. 170. So would a writ of revivor and suggestion: Caspar v. Keachie, 41 U. C. R. p. 601. This case was overruled but not on this point: see also Holme v. Guy, 5 Ch. D. 901; Stroud, 616.

Sections

Judgments.—The decision of the Judge, if not pronounced in court, only becomes a "judgment" when duly entered in the procedure book by the Clerk: Strutton v. Johnson, 7 L. C. G. 141; Holtby v. Hodgson, 24 Q. B. D. 103; see section 144. The proceedings the court can only be proved by such entries: R. v. Rowland, 1 F. & F. 72, per Bramwell, B.; or a certified copy under section 45, and cannot be contradicted even by the evidence of the Judge: Dews v. Riley, 11 C. B., per Jervis, C.J., at

Where the entry was "struck out for want of jurisdiction, a disputed title having been sworn to"; held, not a judgment: Tubby v. Stanhope, 5 C. B. 790.

If pronounced in Court the decision becomes a judgment instanter; section 144; Holtby v. Hodgson, 24 Q. B. D. 103.

If any member of this tribunal should omit to take the oath of office or some necessary act or thing before entering upon his official duties, or should the warden be subsequently declared unduly elected, or become otherwise disqualified, yet the action of the tribunal, being of a judicial nature, would not be illegal: The Margate Pier Co. v. Hannam, 3 B. & Ald. 266. The law raises a presumption in favor of the regular appoint-AIG. 200. The law raises a presumption in favor of the regular appointment or election of an officer from his having acted in an official capacity, and would do so in this case: R. v. Verelst, 3 Camp. 432; Berryman v. Wise, 4 T. R. 366; Doe d. Davy v. Haddon, 3 Doug. 310; Marshall v. Lamb, 5 Q. B. 115; Wolton v. Gavin, 16 Q. B., 48; Butler v. Ford, 1 Cromp. & M. 662; R. v. Howard, 1 M. & Rob. 187, and other cases cited in Taylor on Evidence, 8th ed., p. 187; Holt v. Jarvis, Dra. 190; Smith v. Redford, 12 Gr. 316; School Trustees, Tp. of Hamilton v. Neil, 28 Gr. 408; R. v. Fee, 3 O. R. 107.

16. Where the Judge of the county, the sheriff, the On altera-warden of the county, and the inspector of Division Courts, divisions, Judge to alter the number, limits or extent of the Division Courts direct in what Court within such county, all proceedings and judgments had in proceedings to be any Division Court before the day when such alteration continued. takes effect shall be continued in such Division Court of the county as the Judge directs; and shall be considered proceedings and judgments of such courts. R. S. O. 1877, c. 47, s. 14; 49 V. c. 15, s. 3.

Proceedings and judgments.—See notes to section 15.

As the judge directs.—It is submitted that the most convenient course is to allow the proceedings and judgments to be continued in the court in which they have been entered or recovered.

Such Court .- That is, the court in which the Judge directs the proceedings to be continued.

Sections 17-19

Clerks and officers to deliver papers to such personsas Judge directs.

17. In case a junior county is separated from a union of counties, or the proceedings of any of the Division Courts of a senior county are transferred to another Division Court within the county upon the order of the Judge, the clerks or other officers of such Division Courts who hold any writs or documents appertaining to such courts, or the business thereof, shall deliver up the same to such persons as the Judge directs, and any person refusing to deliver up the same shall be liable to be proceeded against in the same manner as persons wrongfully holding papers and documents under the provisions of section 50 of this Act. R. S. O. 1877, c. 47, s. 15.

Shall be liable to be proceeded against.—See notes to section 50.

After separation of junior from senior county, proceed-ings in certain continued in senior county.

18. If after the separation of a junior county from a union of counties, the territorial limits of any of the Division Courts of the former union are partly within the junior and partly within the senior county, all proceedings commenced in such Division Courts of the former union shall be continued to completion in the court where the proceedings were originally commenced, or in such other Division Court of the senior county as the Judge thereof directs; and the clerks and other officers of the said Division Courts of such senior county, in possession of any writs or documents appertaining to any such Court or to the business there f, shall deliver over the same to the clerk of such Division Court of such county as the Judge thereof directs. R. S. O. 1877, c. 47, s. 16.

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After the separation. - See Municipal Act, R. S. O. c. 184, s. 38. Originally commenced.—That is the court from which the first process issued: Rule 10.

Regulation of limits on of a county.

19. The Judge of the county, the sheriff, the warden of separation the county, and the inspector of Division Courts, at a meeting to be called for the purpose, or at any adjourned meeting, shall, within three months after the issue of a proclamation for separating a junior from a senior county, appoint the number (not less than three nor more than twelve) the limits and extent of the several divisions

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arden of ts, at a ljourned sue of a county, ore than divisions within such county, and the time when such change of section divisions shall take place, and no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind is made and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace. 49 V. c. 15, s. 4.

See notes to sections 13 and 15.

The first meeting may be held, it is submitted, without the proclamation first being made at the General Sessions of the Peace, which is advised in the notes to section 13. But there cannot be any order or resolution changing the same, unless public notice of the intention so to do is made and proclaimed in the manner pointed out by the statute. The section does not prescribe who shall call the meeting as in s. 13, s.s. 2, but as the Judge is first mentioned, probably he should do so. The other persons mentioned should have ample notice of the time and place of meeting, and if not, the action of those present, not being all, would probably be held illegal. A full opportunity of discussing the question should be afforded each member of the tribunal, otherwise the proceedings would be irregular, and any order or resolution made by those present would be bad: In re Potter v. Knapp, 5 P. R. 197; Cannon v. Toronto Corn Exchange, 5 A. R. 268; Labouchere v. Wharncliffe, 13 Ch. D. 346; Temple v. Toronto Stock Exchange, 8 O. R. 705; Fisher v. Keane, 11 Ch. D. 353; also cases cited in notes to section 13.

Shall within three months.—The language of this section, it will be noticed, is express and positive. The direction is imperative: R. S. O. c. 1, s. 8, s. s. 2. But whenever the thing required by a statute to be done has reference to "the time or formality of completing any public act, not being a step in a litigation or accusation" as in this case, the enactment will generally be regarded as merely directory, unless there be words making the thing done void if not done in accordance with the prescribed requirements: Stroud, 723; Cooke v. New River Co. 38 Ch. D. 56; S. C. 14 App. Cas. 698.

The tribunal here constituted may not be concluded from acting, if itneglects to do so at the proper time, but it is obvious that the neglect to perform the duty enjoined by the statute would be unjustifiable.

As to the number of divisions, see notes to section 4.

The notice required before altering or rescinding any resolution or order should be in writing, filed by the Clerk of the Peace and entered at length in the record of proceedings of the General Sessions, together with the fact of proclamation having been made, and when so made, and by whom the notice was presented. No particular time is prescribed for the making of the proclamation at the Court of General Sessions as in some other statutes (R. S. O. c. 27, s. 18), and it may be made at any time during the sittings: R. v. Pawlett, L. R. 8 Q. B. 491.

Procla:nation must be made "at the next previous sittings of the General Sessions of the Peace." Should the persons mentioned in this section fail to act in pursuance of the proclamation before the sittings of the General Sessions next after the making of such proclamation, they could not do so afterwards without notice being given afresh.

A majority of the members present could make a valid decision, if all had due notice of the meeting and full opportunity of discussion; see

Sections cases cited in notes to section 13; In re Ontario and Quebec, 6 L. J. N. S. 212; Worts v. Worts, 22 L. J. N. S. 282.

> If the said officers exercised their judgment honestly and fairly, and consistently with legal principles, the resolution or order, if good on its face, could not be reviewed: Baggalay v. Borthwick, 10 C. B. N. S. 61.

> It would not be so if made corruptly, or in disregard of the plain principles of law or justice: Morgan v. Mather, 2 Ves. Jr. 15; or if any one of them were personally interested in the subject matter: Earle v. Stoker, 2 Vern. 251, for he could not be judge in his own cause: R. v. Bishop of St. Albans, 9 Q. B. D. 454.

> Should any member of the tribunal, the warden for instance, if a Division Court clerk, be interested in extending the limits of his own division, he would be incapable of acting: see notes to section 21 for authorities as to the question of disqualifying interest.

> The resolution or order should not be made separately, but while all are together: Wade v. Dowling, 4 E. & B. 44, and if one were excluded from the meeting by force or fraud the action of the rest would be illegal: In re Templeman & Reed, 9 Dowl. 962.

Clerks of the Peace to record time and place for holding Courts.

20. The clerk of the peace, in a book to be by him kept, shall record the divisions declared and appointed, and the times and places of holding the courts, and the alterations from time to time made therein, and he shall forthwith transmit to the inspector of Division Courts a copy of the record. R. S. O. 1877, c. 47, s. 18; 47 V. c. 10, s. 16; 55 V. c. 11, s. 3.

Clerk of the Peace, -As to the appointment of this officer, see R.S.O. c. 48, s. 11. No provision is made as to the manner in which the information here mentioned is to be imparted to the Clerk of the Peace; but it may be presumed that the Judge will keep him informed. It does not seem to be his duty to attend at the meetings of the tribunal charged with the duty of appointing the number, limits and extent of the several divisions, and the duty of appointing the "times and places of holding the courts" devolves upon the Judge under section 8. The proper course to be adopted is not at all clear.

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"The entries in this book are of such a public nature, that an examined copy, or extracts therefrom, certified as such, and signed by the Clerk of the Peace, would be admissible in any Court of Justice, or before any person having by law, or consent of parties, authority to hear, receive or examine evidence:" 7 U. C. L. J. 177.

Forthwith transmit.—The word "forthwith" has sometimes received a free construction and sometimes a strict one, according to the circumstances under which it has been used. An act has sometimes been held to have been done "forthwith" when done within a reasonable time and an act has sometimes been held to have been done "forthwith" only when done with the least possible delay: per Armour, C.J., Maxwell v. Scarfe. 18 O. R. 531.

Where the act is one which is capable of being done without any delay, no delay can be permitted: per Jessel, M.R. Re Southam. Exparte Lambe, 19 Ch. D. 169; see also Furber v. Cobb, 18 Q. B. D. 494 at p. 504; Lowe v. Fox, 15 Q. B. D., 679, per Bowen, L.J.; Stroud, 301. , and on its 61.

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Where a consequence is "forthwith" to follow on an event, the word Sections imperatively excludes a time within which something else may be done inconsistent with that consequence; thus where a statute provided that a town council on receiving the resignation of a person elected to a corporate office, is "forthwith" to declare that office vacant, the resignation cannot be withdrawn: R. v. Wigan, 14 Q. E. D. 908.

The Clerk of the Peace is not obliged to notify the inspector of anything but the acts of the General Sessions, as to the limits of the different divisions, and the orders of the Judge as to the times and places of holding courts; nothing can be allowed the Clerk of the Peace for it: Poussett and the Quarter Sessions of Lambton, 22 U. C. R. 412.

THE JUDGE.

- 21. (1) The Division Courts shall be presided over Courty by the County Court Judges or Junior or Deputy Judges to preside. in their respective counties.
- (2) The Junior Judge for the county shall (subject to Junior Judge to any other arrangement from time to time made with the hold Division Senior Judge or made by the Judges of a County Court Courts. District which includes such county), preside over the Division Courts of the county.
- (3) The appointment of a Junior Judge shall not pre-Senior Judge to vent or excuse the Judge of the County Court from hold Division presiding at any of the Division Courts within his county Courts when exwhen the public interests require it. R. S. O. 1877, c. 47, pedient. s. 19.

As to the appointment of Senior or Junior Judge, see R. S. O. 1887, c. 46. The Deputy Judge holds his office during pleasure, and in case of the death, illness, or absence of the Judge, he has authority to perform all the duties of the County Judge: R. S. O. c. 46, s. 7. He may practice of the county Judge: R. S. O. c. 46, s. 7. for "every county and part of Ontario": section 11. He cannot give judgment after the expiration of the period for which he was appointed deputy: Hoey v. McFarlane, 4 C. B. N. S. 718.

Where a Deputy Judge is appointed by Government, the law presumes that the necessary facts exist to warrant such appointment, and on the party disputing the validity of the appointment rests the *onus* of establishing its invalidity: R.v. Fee, 3 O. R. 107. It was also held in that case, that it was not essential that the County Judge should be absent from the county in order to enable the Deputy Judge to act.

A County Judge is not answerable, in an action of trespass, for an erroneous judgment or for the wrongful act of his officer, done not in pursuance of, though under color of, a judgment; but he is responsible for an act done by his command and authority, when he has no jurisdiction: Houlden v. Smith, 14 Q. B. 841. If an order of commitment were made under the judgment summons clauses, to any but the gaol of the county in which the party summoned resided or carried on business, trespass would lie against the Judge if warrant issued by his authority.

Section 21 So, also, it would be a want of jurisdiction to summon a person under such circumstances: Ib. 853. See also In re Dulmage v. Judge of Leeds and Grenville, 12 U. C. R. 32. He is also entitled to notice of action if he acted honestly believing that his duty as a Judge called was finnt to do so: Booth v. Clive, 10 C. B. 827. Want of jurisdiction must be made to appear to the Judge, and if there is no evidence of that either on the face of the proceedings (Houlden v. Smith, 14 Q. B. 851, per Patterson, J.), or given before the Judge, he is not liable in trespass (Graham v. Smart 18 U. C. R. 482), nor are the officers of the court acting in execution the order, Ib.: Andrews v. Marris, 1 Q. B. 3; Watson v. Bodei, 14 M. & W. 57; Thomas v. Hudson, 14 M. & W. 353, in Ex. Cham., 16 M. & W. 885. "The Judge of the Division Court," said Robinson, C.J., at p. 487 of 18 U. C. R., "was bound to act upon what appeared before him, and cannot be made a trespasser by proof of facts given at any other time or in any other court."

At p. 489 of the same report, Burns, J., says: "It appears to me the plaintiff, by suffering judgment by default against him, is not in a position to dispute the jurisdiction of the court. If the want of jurisdiction was apparent upon the proceedings, then of course it would be open for him to question the right upon any steps taken upon a proceeding in that manner, as coram non judice; but I do not think he can question the jurisdiction, by bringing evidence to dispute the place where the cause of action arose in whole or in part, after he has acquiesced in it in whole by suffering judgment by default; and in an action against the Judge, the Judge of the County Court would be in a serious predicament if he were obliged to be prepared with evidence to sustain his judgments against persons simply because it be shown that the parties sued do not reside within his county. The effect of what the plaintiff contends for in this case would compel the Judge to do that, if such a proposition be established. The plaintiff should have appeared to the summons, and have raised the question, and the Judge would then have tried the question of jurisdiction; or if he did not wish the Judge of the County Court to have determined the point, he might have applied to one of the Superior Courts for a prohibition."

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As regards Judges and judicial officers, the general rule is, that if they do any act beyond the limit of their authority, causing injury to another, they are liable for it; but if the act be done within that limit through an erroneous or mistaken judgment, they are not liable: Doswell v. Impey, 1 B. & C. 163; Garner v. Coleman, 19 C. P. 106. Trespass will not lie for a judicial act done without jurisdiction, unless the Judge knew or had the means of knowing of it: Calder v Halkett, 3 Moo. P. C. 28; Garner v. Coleman. 19 C. P. at p. 109; Kemp v. Neville, 10 C. B. N. S. 545, and cases there cited; Davis' C. C. Acts, 3rd Ed. 180 et seq. Judicial functions cannot be delegated: Andrews v. Marris, 1 Q. B. 3. A Superior Ccurt can order a County Judge to proceed with the hearing of a case, but cannot deal with any order which he may make: Churchward v. Coleman, L. R. 2 (). B. 18; Coolican v. Hunter, 7 P. R. 237. The signature to a Judge's order need not be by the hand of the Judge himself. If impressed with a stamp by the clerk in his presence it is good: Blades v. Lawrence, L. R. 9 Q. B. 374. Words spoken by a County Judge sitting on the trial of a cause, though irrelevant to that matter, are not actionable: Scott v. Stansfield, L. R. 3 Ex. 220; Munster v. Lamb, 11 Q. B. D. 588. No action lies against the Judge of a Superior Court for a judicial act, though alleged to have been done maliciously and corruptly: Fray v. Blackburn, 3 B. & S. 576; Ward v. Freeman, 2 Ir. C. L. R. 460; Odgers on Libel and Slander, 2nd Ed. 187, 188, 189; Hind v. Brett, W. N. (1883) p. 37. A Judge cannot try a cause in which he is interested: R. v. Meyer, 1 Q. B. D. 173. But even in a case of imputed interest

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he is not incapacitated from making an order if refusing to do so would Sections be a denial of justice: Grand Junction Canal Co. v. Dimes, 18 L. J. Chan. 365; 19 L. J. Chan. 345, s.c. The Lord Chancellor was held disqualified to hear a case in which a company were plaintiffs, owing to the fact that he had an interest as a shareholder: Dimes v. Grand Junction Canal Co., 3 H. L. Cas. 759; see also London & North Western Railway Co. v. Lindsay, 3 MacQueen H. L. Cas. 99; Medwin ex parte, 1 E & B. 609; R. v. Cambridge (Recorder), 8 E. & B. 637; R. v. The Justices of Suffolk, 18 Q. B. 416; R. v. Rand, L. R. J Q. B. 230; Hayman v. The Governors of Rugby School, L. R. 18 Eq. 28; Bigelow v. Bigelow, 6 P. R. 124. A counsel in a cause, being after raised to the Bench, is not precluded from taking part in the hearing and discussion of that cause, but he may properly decline: Thellusson v. Rendlesham, 7 H. L. Cas. 429. Private communications to a Judge upon a matter publicly before him are highly improper, and amount to contempt of court: In re Dyce, Sombre, 1 Mac. & G. 116; 13 Jurist, 857, s. c.

An attachment will not lie against a County Court Judge for not obeying a certiorari, unless it clearly appears that he acted contumaciously: In re Judge of Niagara District, 3 O. S. 437. Nor can he be arrested on mesne or final process: Adams v. Ackland, 7 U. C. R. 211. A County Court Judge cannot refuse to attend under a subpœna duces tecum to produce a deed, on the ground of private business, or that he obtained the deed, or became possessed of his information as an attorney, or that he had a lien on the deed or was entitled to witness fees as an attorney: Deadman v. Ewen, 27 U. C. R. 176. He cannot directly or indirectly practice as a counsel, attorney or solicitor, notary public or conveyancer, under penalty of forfeiture of office and further penalty of \$400: R. S. O. c. 46, s. 6; see also Allen qui tam v. Jarvis, 32 U. C. R. 56. Change of venue was ordered in ejectment where County Court Judge was defendant, where plaintiff might otherwise have proceeded under Overholding Tenants' Act: Anon, 4 P. R. 310. Where a reference is made at Nisi Prius to a County Judge by name, though his description as Judge is added, he is entitled to his fees as arbitrator: Wood v. Foster, 6 P. R. 175.

As to the affect of the death of the Judge in cases pending, see Leslie v. Emmons, 25 U. C. R. 243; Hoey v. McFarlane, 4 C. B. N. S. 718; Applebe v. Baker, 27 U. C. R. 486.

Should the Junior Judge be sick, absent or otherwise unable to hold the Division Court, it would be the duty of the Senior Judge, under this sub-section, to hold the court.

By the R. S. O., 1887, c. 46, s. 13, it is provided that, "at any sittings of the County Court at the same time as the sittings of the Court of General Sessions of the Peace, or of a Division Court in any county, or of any two of the said courts at the same time, either the Senior or Junior Judge, or both of them, may, if the Senior Judge thinks fit, preside in any of the said courts, or each of them in one of said courts at the same time, so that two of the said courts may sit and the business therein be proceeded with simultaneously."

22. In case of the illness or absence of the Judge, a Who to preside in Judge of the County Court of any other county may case of illness or hold the court, or the first mentioned Judge may appoint absence of Judge. some barrister of the Bar of Ontario to act as his deputy; and the Judge of such other County or the barrister so appointed shall, as Judge of the Division Court, during the time of his appointment, have all the powers and

Sections 22-23

privileges, and be subject to all the duties vested in or imposed by law on the Judge by whom he has been appointed. R. S. O. 1877, c. 47, s. 20.

Under the Consolidated Statutes of Upper Canada, c. 19, s. 17, the absence of the Judge was required to be "unavoidable." It is not so now. It is not necessary that any order made by the barrister so appointed Deputy Judge should show the reason for such appointment. The maxim, "all acts are presumed to be rightly done" applies: In re Hawkins, 3 P. R. 239.

In R. v. Fee, 3 O. R. 107, it was held that where a commission was issued by the Governor-General in Council appointing a barrister a Deputy Judge during pleasure and the absence of the County Judge under leave of absence granted to him by Order in Council, it was not necessary to prove the Order in Council granting such leave of absence, and that the general presumption of law should prevail, namely, that a person acting in a public capacity was properly appointed and duly authorized to act until the contrary was shewn by the person disputing it. It was also held in that case that it was not essential that the County Judge should be absent from the county in order to enable the Deputy Judge to act.

By the R. S. O. c. 46, s. 14, such Judge may, "if he sees fit, perform any judicial duties in any county other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs." By the 16th section of the same statute, full power and authority is given to such Judge to perform all judicial duties which could have been performed by the Judge of the county. It was contended in the case of Wilson v. McGuire, 2 O. R. 118, that the Provincial Legislature could not authorize the Judge of one county to hold a Division Court in another county. This contention was not sustained. In Gibson v. McDonald, 7 O. R. 401. it was held that a Judge of one county could not preside at the court of General Sessions of any county but his own.

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The following rules are deducible from the case of In re Leibes v. Ward, 45 U. C. R. 375, where a Junior Judge had, under this section, appointed a barrister to hold the sittings of a particular Division Court for him: (1) that the word "Judge" here used includes the Junior Judge; (2) that the deputation held good until the work of the particular court was completed; (3) that a Deputy Judge so appointed had power to appoint a subsequent time and place in the county, though not in the division of the court, for subsequent delivery of judgment; (4) that the deputation itself clothed the gentleman so appointed Deputy Judge with all the powers, within the county, of Junior Judge. See also Gibson v. McDonald, 7 O. R. 401; Baker v. Cave, 1 H. & N. 674; Margate Pier Co. v. Hannam, 3 B. & Ald. 266; Waterloo Bridge Co. v. Cull, 1 E. & E. 213; Applebe v. Baker, 27 U. C. R. 489; Hoey v. McFarlane, 4 C. B. N. S. 718 and 732; Smith's Master and Servant, 4th ed. 4, 5.

The death of the Judge ends the authority of such a deputy: Hoey v. McFarlane, 4 C. B. N. S. 718, 732. The appointment had better be in writing, but is it necessary to be so? See R. v. Justices of Salop. 4 B. & Ald. 626, per Bayley, J., at p. 629, and R. v. Justices of Surrey, 5 B. & Ald. 539, per Abbott, C.J.

Lieutenant-Govnotified of appointment of deputy.

23. The County Judge so appointing or the barrister ernor to be so appointed deputy shall forthwith send to the Lieutenant-Governor notice of the appointment, specifying the name, residence and profession of the deputy Judge, and the cause of his appointment. R. S. O. 1877, c. 47, s. 21.

Appointment.—The notice of appointment should either be sent by the Judge or the barrister so appointed "forthwith," as to the meaning of which see notes to section 20.

Residence .- See notice to section 81.

24. No such appointment shall be continued for more Duration of appointment a renewal of the like notice; and ment. in case the Lieutenant-Governor disapproves of the appointment, he may annul the same. R. S. O. 1877, c. 47, s. 22.

One month.—This is a calendar month: R. S. O. c. 1, s. 8, s.s. 15. The day on which the appointment was made would be excluded: Lester v. Garland, 15 Ves. Jun. 248; Hanns v. Johnston, 3 O. R. 100.

25. In case the Judge or the acting Judge, from illness Adjournor any casualty, does not arrive in time or is not able to Court if
open a Division Court on the day appointed for that not arrive
purpose, the clerk or deputy-clerk of the court shall after
eight o'clock in the afternoon, by proclamation, adjourn
the court to an earlier hour on the following day, and so
from day to day, adjourning over any Sunday or legal
holiday, until the Judge or acting Judge arrives to open
the court, or until he receives other directions from the
Judge or acting Judge. R. S. O. 1877, c. 47, s. 23.

The expression "acting Judge" refers to the Judge of any other county, the Junior Judge, or a deputy appointed under section 22.

Casualty.—The difference in the words used in section 22 and in this, is to be observed. "Casualty," here may, we submit, be taken to mean some unforeseen accident or other cause preventing the Judge's attendance.

Clerk or Deputy Clerk .. - See section 32.

Earlier hour-i. e., than eight o'clock p.m.

Holiday.—See R. S. O. c. 1, s. 8, s-s. 16. The word holiday includes "Sundays, New Year's Day, Good Friday, Easter Monday, and Christmas Day, Dominion Day, the days appointed for the celebration of the birth of Her Majesty and Her Royal Successors, and any day appointed by proclamation of the Governor-General or Lieutenant-Governor as a public holiday or for a General Fast or Thanksgiving."

A judgment entered on any such days would perhaps be questioned; Trust and Loan Co. v. Dickson, 2 L. J. N. S. 166; Connelly v. Bremner, L. R. 1 C. P. 557.

As to holding Division Courts in Territorial Districts, see R. S. O. c. 91, s. 18.

CLERKS AND BAILIFFS, ETC.

26. For every Division Court there shall be a clerk Every and a bailiff or bailiffs, who shall be British subjects, and have clerk shall respectively perform the duties of their office as reguballiffs. lated by Act of the Legislature, and by rules or orders

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rrister tenantname, nd the sections made by the board of County Judges. R. S. O. 1877, c. 47, s. 24.

Bailiff or bailiffs.—These are the executive officers of the court. As a general rule all persons of sane mind are capable of holding office: 2 U. C. L. J. 63. A clerk and bailiff could not be the same person: 2 U. C. L. J. 64. Persons under 21 years of age are deemed by law incapable of the skill necessary in such an office: 2 U. C. L. J. 64. If more than one bailiff, each should do his work independently of the other: 2 U. C. L. J. 64, and cases there cited.

Duties.—A refusal to perform the duties without a color of right would be a misdemeanor, punishable with fine or imprisonment, or both: Roscoe's Crim. Evidence, 11th Ed. 783. So also would acts totally illegal committed by a bailiff under color of his office: Roscoe's Crim. Evidence, 11th Ed. 782; R. v. Wyat, 1 Salk. 380; R. v. Bembridge, 3 Doug. 327; R. v. Borron, 3 B. & Ald. 434; R. v. Tisdale, 20 U. C. R. 272; Parsons v. Crabbe, 31 C. P. 151.

Appointment of clerks and bailiffs, 27. The Lieutenant-Governor may appoint, during pleasure, the clerk and bailiff or bailiffs of any Division Court. 43 V. c. 8, s. 33.

During pleasure.—Every clerk and bailiff appointed, holds his office during the pleasure of the Government. By the R. S. O. c. 1, s. 8, s. s. 26, words authorizing the appointment of any public officer shall include the power of removing him, or appointing another in his stead, in the discretion of the authority in whom the power of appointment is vested.

Prior to 5th March, 1880, clerks and bailiffs were appointed by the Judges, who had also express power of removal, but under this Act a Judge may remove only a clerk or bailiff within his own county who was originally appointed by a Judge, and cannot do more than suspend one appointed by the Government: see secs. 29 and 31.

Clerk not to practice as to practice, a barrister or solicitor. R. S. O. 1877, c. 47, s. 25; 43 V. etc.

c. 8, s. 35.

If a practicing barrister or solicitor be appointed, he must cease practice at the time of his appointment. He could not even continue a suit in which he might be engaged. No penalty is attached to the violation of this section, but the appointee would be liable to indictment for its disobedience: R. v. Sainsbury, 4 T. R. 451; 2 R. R. 433; R. v. Davis, Sayer, 133; Russell on Crimes, 5th Ed. 193; Burbridge's Crim. Dig. 109-114; Roscoe's Crim Evi. 782. The words of the section are very ambiguous. They are not nearly so wide or sweeping as those respecting Judges: R. S. O. c. 46, s. 6. There would appear to be nothing to prevent a clerk from acting as a conveyancer or notary public. What is practicing as a barrister or solicitor? The subject will be found discussed in Law Society v. Macdougall, 13 O. R. 204; 15 A. R. 150; 18 S. C. R. 203. Strong, J., says, 18 S. C. R. p. 212: "The only way in which I can conceive a solicitor can be said to practice as such in the courts is by exercising the functions of a solicitor, by taking on behalf of a client some of the regular steps of procedure in an action or some other judicial proceeding." See also Law Society v. Waterlow, 8 App. Cas. 407; Re Horton, 8 Q. B. D. 434.

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29. The Judge of the County Court may at pleasure Sections suspend or remove any clerk or bailiff within his own Removal county heretofore appointed by a Judge. 43 V. c. 8, s. 36. of elerk or balliff by

This section gives power when the appointment of the officer has Judge. been made by a Judge.

30. The Lieutenant-Governor may, upon the report of Dismissal the Inspector, or of the County Court Judge, dismiss from bailiffs. office for misconduct or incompetency, any clerk or bailiff heretofore appointed. 43 V. c. 8, s. 32.

Power is here given to the Lieutenant-Governor to dismiss clerks and builiffs who had been appointed by a Judge prior to 5th March, 1880. As to "misconduct" see section 277 and notes thereto.

What amounts to "incompetency" must be determined with reference to each particular case. What might properly be considered "incompetency" in a clerk of a city office, where a large amount of business is done, might not be so in a country office where suits are few.

31. (1) Nothing in this Act contained shall relieve the Duty of County County Judge from the responsibility of seeing that the Court Judges. officers of his court perform their duties, or from examining into complaints which may be made against them, or from the duties imposed upon him in reference to the security to be given by clerks and bailiffs, and such last mentioned duties are declared and shall be held to be of a judicial and not of an administrative character.

(2) The Judge may, for cause, suspend any clerk or suspension of clerk or bailiff appointed by the Lieutenant-Governor, and in case bailiff by Judge. of such suspension by him, he shall forthwith report the same and the cause thereof to the Provincial Secretary; and in case a vacancy shall occur in the office of clerk or builiff within his county, the Judge shall forthwith notify the Provincial Secretary thereof. 43 V. c. 8, s. 34.

Formerly the responsibility which attached to the Judge in connection with clerks' and bailiffs' securities was of an administrative character: See Parks v. Davis, 10 C. P. 229, but now it is a "judicial" one, very different in its nature and responsibility from the other: See notes

Suspend.—This suspension cannot be made except "for cause," e.g., some misconduct in his office and must be reported "forthwith" to the Provincial Secretary. See Jenkins v. Cook, 1 P. D. 80.

See notes to section 20.

Section

32. Leave of absence may be granted by the Inspector of Division Courts to any clerk or bailiff for a period not inspector exceeding two months. In the event of leave of absence hisygrant exceeding two months. In the event of leave of absence leave of absence to being so granted to any clerk, he may from time to time, clerks or with the approval of the inspector appoint a deputy to act for him with all the powers and privileges, and subject to like duties. He may remove such deputy at his pleasure, and the clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy. 45 V. c. 7. s. 3.

> The Inspector.—At one time it was doubted whether the Legislature could apparently delegate its power in this way: R. v. Hodge, 46 U.C.R. 141; R. v. Severn, 2 S. C. R. 70, but it was decided by the Judicial Committee of the Privy Council that Legislatures have the right in matters within their jurisdiction to delegate certain powers which may be exercised by the Legislature themselves, and it is now settled that such enactments as this are not ultra vires of the Provincial Legislature: Hodge v. The Queen, 9 App. Cas. 117; Sulte v. Three Rivers, 11 S. C. R. 25; Re "The Liquor License Act, 1883," 5 C. L. T. 66; Sinclair's "Liquor License Act," 15; Citizens' Ins. Co. v. Parsons, 7 App. Cas. 96; Verratt v. McAulay, 5 O. R. 318, and other cases cited Sinclair's "Liquor License

> Not Exceeding two months.—The time here mentioned would commence to run from the posting of the inspector's letter granting leave, mence to run from the posting of the inspector's letter granting leave, and not from its receipt by the clerk or bailiff: Dunlop v. Higgins. 1 H. L. Ces. 381; Household F. Ins. Co. v. Grant, 4 Ex. D. 216; Union F. Ins. Co. v. Fitzsimmons, 32 C. P. 602; O'Donohue v. Wiley, 43 U. C. R. at page 363; Frey v. Wellington M. Ins. Co., 4 A. R. 293. The day of posting the letter would be excluded; Young v. Higgon, 6 M. & W. 49; see also McCrea v. Waterloo M. Fire Ins. Co., 26 C. P. 437; 1 A. R. 218; ex parte Whitton, In re Greaves, 13 Ch. D. 881.

> From time to time. The clerk may, with the approval of the inspector, appoint a deputy or deputies to act for him during the time of his absence. He cannot have more than one deputy at a time, but he may have several in succession during the time he is absent on leave. See Stroud, 313; Neilson v. Jarvis, 13 C. P. 176. The words "from time to time" may be construed to mean "as often as he pleases." Proceedings in all matters may be taken in the name of the clerk, "by A. B., deputy clerk," or in the name of the deputy clerk himself: Westbrook v. Miller, 22 N. W. Rep. 256. His authority only exists during the tenure of office of the clerk whose deputy he is, and should the clerk die, or be removed, the authority of the deputy would thereby cease. The fees pertaining to the office would belong to the clerk and not to the deputy, and any rights therefor would be in the name of the clerk. The deputy clerk cannot have more or less power than his principal, and all duties which the clerk could perform should be performed by him: Parker v. Kett, 1 Salk. 95; Godolphin v. Tudor, 2 Salk. 468; In re Hoey v. McFarlane, 4 C. B. N. S. 718. The clerk can remove his deputy at pleasure.

> The clerk may have as many assistants in his office as he thinks necessary, but they are not recognized as deputy clerks in the proper

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significance of the word, though they would be held in law to be the principal's deputy when doing any particular act under his direction. But it is doubtful if such assistants would have power to sign process, administer affidavits, approve instruments, take confessions, record judgments, or to do such matters as the Legislature evidently trusted to be done by the clerk personally. Such assistant clerks are employed in the offices of the Superior Courts and County Courts; but any writs or documents they issue are previously signed by the principal officer, whose agents they are for the particular act. The term deputy applies only to one who has all the authority which the principal has by virtue of his office. A deputy then is one who acts by the rights, in the name of, and for the benefit of some one else: he is a mere servant of his principal, though he has the power, by operation of law, to do any act which his principal might do (1 Salk. 95); and by making a deputy, the whole power of the principal passes to him; 2 Salk. 468; and see 1 Salk. 96: R. v. Smith, Farr. 78.

"Ministerial officers can, by Common Law, make a deputy: 4 Bulstr. 78: 3 Mod. 150. Whether Division Court clerks come within the general rule is not material to be considered, for the statute has expressly provided for the appointment of deputies, thus rather diminishing than enlarging any Common Law power, for the express provision would appear by implication to exclude the power of appointment except as provided for: 9 U. C. L. J. 32, 33. Expressum facit cessare tacitum; see Elphinstone on Deeds 89, 418, 424.

Sureties shall be responsible for deputy.—If the sureties' covenant were entered into prior to the Act authorizing the appointment of a deputy 10th March, 1882, it is doubtful if they would be responsible for the defaults of the deputy: Pybus v. Gibb, 6 E. & B. 902.

33. The clerk may, (with the approval of the Judge), when clerk may from time to time, when prevented from acting, by illness appoint or other unavoidable accident, appoint a deputy to act for him, with all the powers and privileges and subject to like duties, and may remove such deputy at his pleasure, and the clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy R. S. O. 1877, c. 47, s. 35.

This section differs from the last one in this, that the clerk, under this section, may, with the approval of the Judge, appoint a deputy from time to time, when prevented from acting "by illness or other unavoidable accident" only, while under section 32 the inspector may grant leave of absence for whatever cause he may see fit, and may approve or disapprove, at pleasure, of any person that the clerk appoints.

34. Where a bailiff is temporarily unable to perform Appointthe duties of his office from illness, leave of absence or deputy by other temporary disability, he may from time to time, with the approval of the inspector of Division Courts, appoint a deputy to act for him, with all the powers and privileges and subject to like duties, and may remove such deputy at

Sections

Sections his pleasure, and the bailiff and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy. No such appointment shall have force for a longer period than two months. 45 V. c. 7, s. 4.

> The appointment can only be made by a bailiff:—(1) Where he is temporarily unable to perform the duties of his office from illness; (2) absent on leave; (3) or by reason of other temporary disability. The appointment can only be made with the approval of the inspector and cannot be for a period exceeding two months.

> The Judge is not here empowered to remove a deputy bailiff, but probably where a bailiff could be removed or suspended by the Judge, so also could his deputy.

> With the approval of the inspector, a new appointment of the same person could probably be made from time to time at the expiration of every two months.

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Securities.

Clerks and bailiffs to give security. Rev. Stat.

35. Subject to the provisions of section 24 of The Act respecting Public Officers, every clerk and bailiff of a Division Court shall give security by a covenant according to the form of the Schedule to this Act, or in words to the same effect, with so many sureties, being freeholders and residents within the County, and in such sums, as the County Judge directs, and, under his hand, approves and declares sufficient. R. S. O. 1877, c. 47, s. 28.

The Act respecting Public Officers.—The following are the provisions here referred to:

Certain public officers may give security of

"24.-(1) Whenever a Sheriff, Registrar, Division Court Clerk or Bailiff, or other public officer, is required to give security for the performance of his duties, or other security of a like nature, and whether such security enures for the benefit of the Crown or of any person injured by the default or misconduct of such officer, the Lieutenant-Governor in companies. Council may, by Order in Council, direct that the bond or policy of guarantee of any incorporated or joint stock company empowered to grant guarantees, bonds, covenants or policies for the integrity and faithful accounting of public officers, or other like purposes, and named by such Order in Council, may be accepted as such security, upon such terms as may be determined by the Lieutenant-Governor in Council; and the provisions of law with reference to the legal effect of such securities when given by individuals, to the filing thereof, and to the mode of proceeding thereon, shall apply to the security given by every such

> (2) The interim receipt of the company may be accepted in lieu of the formal security, but the formal security shall be completed within one month." R. S. O. c. 15, s. 24.

> Security.—The word "security" shall mean sufficient security; and where these words are used one person shall be sufficient therefor, unless otherwise expressly required: R. S. O. c. 1, s. 8, s-s. 20. As to the object of this security, see 8 U. C. L. J. 263, and 9 U. C. L. J. 9.

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ity; and it there-. 20. As Covenant.—It is a joint and several covenant and enures to the benefit of "any person suffering damages by the default, breach of duty or misconduct of the clerk or bailiff:" section 37. When sued on in the Division Court, the particulars must be according to Form 18, Rule 6.

The joint suretyship of the other surety is part of the consideration for the contract of each, and any release of one would be a release of the other: Bonser v. Cox. 4 Beav. 879; Ward v. National Bank of New Zealand, 8 App. Cas. 764; but if the rights against the other surety are reserved he is not discharged: Thompson v. Lack, 3 C. B 540; Kearsley v. Cole, 16 M. & W. 123; Dewar v. Sparling, 18 Gr. 637.

Words to the same effect.—A substantial compliance is all that is required: Re Allison, 10 Ex. at p. 568, per Parke, B.; R. v. Hyde, 7 E. & B. 859 (note); Eggington v. Lichfield (Mayor &c.), 5 E. & B. 100; R. v. Justices of Cheshire, 3 D. & L. 337; Henry v. Armitage, 12 Q. B. D. 257. It is usually a great deal safer to follow the form given by the statute, when applicable, than to attempt to make any improvement in it.

Sureties.—The word "sureties" means sufficient sureties: R. S. O. c. 1, s. 8, s-s. 20. An infant cannot be a party to the bond: Fisher v. Mowbruy, 8 East, 330; Baylis v. Dinely, 3 M. & S. 477; Stikeman v. Dawson. 16 L. J. Ch. 205: 1 DeG. & Sm. 113; nor would he be bound even if he fraudulently represented himself to be of age: Bartlett v. Wells, 1 B. & S. 836. A married woman could be one of the sureties, provided she were possessed of separate estate: Lawson v. Laidlaw, 3 A. R. 77 and 92; Morrell v. Cowan, 7 Ch. D. 151; Dame v. Slater, 21 O. R. 375; but in the present state of our law it might not be well to approve of such a bond.

As a general rule, the sureties on an official bond, are liable for the faithful performance of all duties imposed upon such officer whether by laws enacted previous or subsequent to the execution of the bond which properly belong to and come within the scope of the particular office. They are not, however, liable for after imposed duties which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed: Brandt on Suretyship, sec. 469; Green v. Ponton, 8 O. R. 471; Gray v. Ingersoll, 16 O. R. 194; Middlesex v. Smallman, 19 O. R. 349; 20 O. R. 487.

A clerk or bailiff and his sureties would be liable for the acts of all deputies, and assistants and clerks: R. v. Stanton, 2 C. P. 18; Verratt v. McAulay, 5 O. R. 313.

The Scope of the Covenant.—The covenant is "that (the clerk or bailiff) shall duly pay over to such person or persons entitled to the same all such moneys as he shall receive by virtue of the said office, and shall and will well and faithfully do and perform the duties imposed upon him by law, and shall not misconduct himself in the said office to the damage of any person being a party to any legal proceeding." The liability attaches only if a legal appointment has been made and the sureties are not estopped from shewing that no legal appointment has been made: Kepp v. Wiggett, 10 C. B. 35. The default or misconduct charged must be such as is contracted against and within the scope of the officer's duties: Warre v. Calvert. 7 A. & E. 154; King v. Norman, 4. C. B. 894; McIntosh v. Jarvis, 8 U. C. R. 532.

Default in Paying over Money.—Any moneys received by virtue of his office are within the covenant; e.g., bailiffs fees received by a clerk and not paid over: Cool v. Switzer, 19 U. C. R. 199. The state of the account between the plaintiff and the officer is binding on the sureties; where, therefore, a clerk had been credited with fees on account for goods sold him by plaintiff, it was held that the sureties were not entitled to

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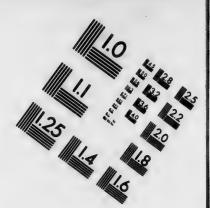
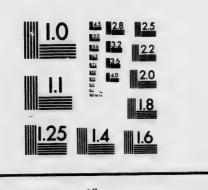
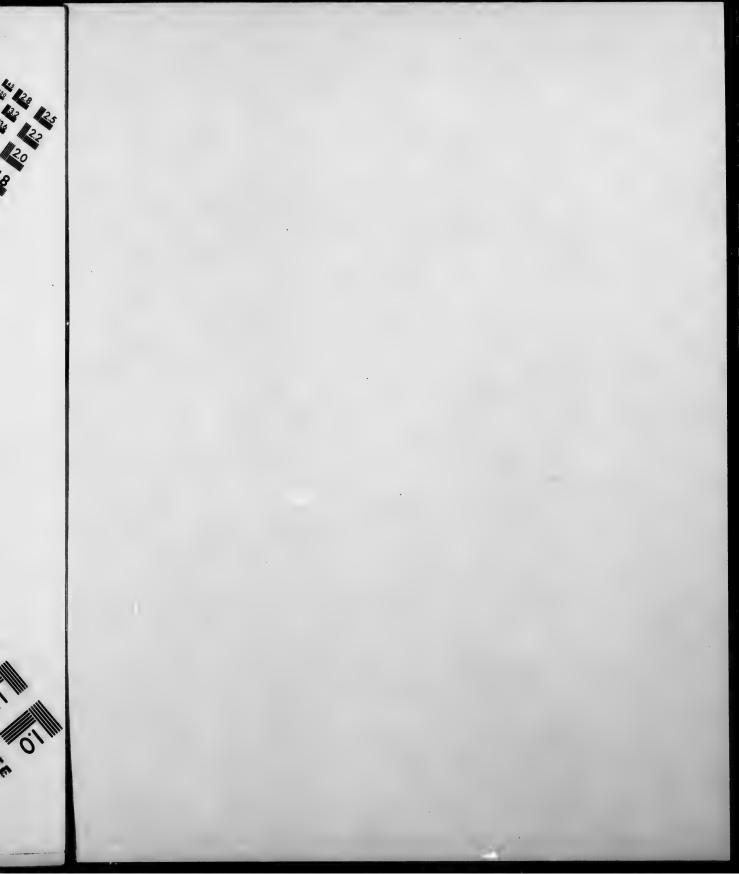


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credit therefor against moneys not paid over: Franklin v. Gream, 20 U. C. R. 84. If moneys have been received by an officer which he was not by law entitled to demand, and which he could not be compelled to accept, e.g., as an indemnity, the sureties will not be liable therefor: Kero v. Powell, 25 C. P. 448; Preston v. Wilmot, 23 U. C. R. 348. Money received "by virtue of his office" is such as is received for the purpose of being paid over to a party in a legal proceeding, and which money, at the time of its being received by the officer, was so received to the use of such party: per Gwynne, J., 25 C. P. 453. The moneys must be actually received: Canada West F. M. & S. Ins. Co. v. Merritt, 20 U. C. R. 444; Corp. of Rawdon v. Ward, 27 U. C. R. 609; Montefiore v. Lloyd, 15 C. B. N. S. 203. Payment otherwise than in money will not discharge a debtor, so that a personal set-off against the officer, through agreed to by him, would not, of itself, render the sureties responsible; though, if the debt were lost, they might be liable for the officer's neglect: see Fraser v. Gore District M. F. Ins. Co., 2 O. R. 416. The sureties would be liable for interest: Ackermann v. Ehrensperger, 16 M. & W. 99. Though money may not, in the first instance, be received "by virtue of the office," it may afterwards become so, as where a bailiff seized and sold a stranger's goods, and then took interpleader proceedings concerning the proceeds, which resulted in an order of the Court to pay the money to the stranger: McArthur v. Cool, 19 U. C. R. 476. receipt of money by a deputy would render the sureties responsible: sec. 32; Verratt v. McAulay, 5 O. R. 313. Where a clerk directed money to be remitted to him by a banker's draft, and gave a receipt therefor, it was held to amount to a payment to him, though the banker failed before presentment; but quære, whether it would have been a receipt within the covenant had his sureties been sued: McLeish v. Howard, 3 A. R. 503.

Non-Performance of Duties .- Wherever by the Act or Rules a duty is imposed upon a clerk or bailiff and he neglects that duty, and the person to whom he owes the duty is damaged without any want of care on his part, the sureties will be liable. As a general rule damage is the essence of the action, and if the evidence shews that had the duty been performed the plaintiff would have derived no benefit, the action must fail: Hobson v. Thelluson, L. R. 2 Q. B. 642; Brown v. Wright, 35 U. C. R. 378; Nerlich v. Malloy, 4 A. R. at p. 435. But for the nonperformance of some duties, nominal damages may be given, e.g., the neglect of a bailiff to return an execution within three days after the return day thereof under section 280: see Nerlich v. Malloy, 4 A. R. 430. A bailiff is not liable for not seizing goods, of the presence of which in his bailiwick, he has no notice: Yourrell v. Proby, 2 Ir. R. C. L. 460. In an action against a bailiff for not seizing goods, he may prove that the goods were covered by a chattel mortgage and he will not then be liable: Stimson v. Farnham, L.R. 7 Q. B. 175. He is not bound to use extraordinary exertion or provide against an unexpected or unforseen contingency: Hodgson v. Lynch, 5 Ir. R. C. L. 353. Where an execution is issued under section 103 to the bailiff of a court within the county, other than that in which the action is brought, it is necessary to shew that the goods were "in or near to" the division of such bailiff: Davy v. Johnston, 31 U. C. R. 153. When the bailiff fails to execute a warrant of commitment, or allows the debtor to escape, not only the debtors own resources but all reasonable probabilties formed upon his position in life and surrounding circumstances, that the debt, or any portion of it, would have been discharged if he had been taken or remained in custody, may be taken into account: MacRae v. Clarke, L. R. 1 C. P. 403; but where the debtor was insolvent, nominal damages only were given: Brown v. Paxton, 19 U. C. R. 426. There must be proof of negligence: Nelson v. Baby, 14 U. C. R. 235. If the bailiff take insufficient sureties on a repley not O. I who in 2 his a 223.

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plevin bond he will be liable to all damages naturally flowing therefrom, not exceeding the penalty of the replevin bond: Norman v. Hope, 13 O. R. 556; 14 O. R. 287; see Yea v. Lethbridge, 4 T. R. 433; 2 R. R. 425, where the value of the goods was held to be the limit of recovery: see note in 2 R. R. 426. If a bailiff does not exact payment of his fees in advance his sureties are nevertheless liable: Bank of Ottawa v. Smith, 16 L.J.N. S. 223.

Misconduct.—By the express terms of the covenant, damage is of the essence of an action for misconduct. Selling a debtor's goods contrary to orders from the creditor would be misconduct: Sloan v. Creasor, 22 U. C. R. 127. The misconduct must be in the exercise of the duties of his office. The exaction of legal fees, assuming to do more than the process justified, as by breaking open the door of a dwelling house, making a false return to process, are instances of misconduct: Smart v. Hutton, 8 A. & E. 568. The sureties are not responsible for the seizure of the goods of a stranger: McArthur v. Cool, 19 U. C. R. 476.

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Demand.—No demand is necessary upon the bailiff, except in cases falling within section 104. A clerk is not bound to transmit by post any moneys, nor to procure and transmit post-office orders therefor, except upon the request and at the expense of the party entitled thereto. Without such direction and request, all moneys are payable at the office of the clerk: Rule 159; McLeish v. Howard, 3 A. R. 506. Except by compliance with this Rule no demand is necessary: Gibbs v. Southam, 5 B. & Ad. 911.

Parties.—A recovery against the officer will be a bar to any action against the sureties: Sloan v. Crcasor, 22 U. C. R. 127; Miller v. Corbett, 26 U. C. R. 478; Pearson v. Ruttan, 15 C. P. 79. To any action against the sureties the officer should be a party: Exchange Bank v. Springer, 29 Gr. 270; and if the action fails against the officer, it will also fail against the sureties: Pearson v. Ruttan, 15 C. P. 79; R. v. McPherson, 15 C. P. 17. At Common Law all parties could be sued together, or each separately, but two could not be proceeded against in one action: R. v. McPherson, 15 C. P. 17.

Release.—Any material increase in the duties of the officer will release the sureties: Pybus v. Gibb, 6 E. & B. 902; Victoria M. F. Ins. Co. v. Davidson, 3 O. R. at p. 383; or where the officer undertakes to the plaintiff additional liability: Bonar v. Macdonald, 3 H. L. Cas. 226; but where the duties are lessened the sureties will not be discharged: Frank v. Edwards, 8 Ex. 214. Where the limits of the court are changed it would be advisable to obtain new covenants: Thompson v. McLean, 17 U. C. R. 495; Corp. of Ontario v. Paxton, 27 C. P. 104. Where the amount or mode of payment by the officer is altered by agreement with the creditor the sureties may be released: see London & N. W. Ry. Co. v. Whinray, 10 Ex. 77; Bank of Toronto v. Wilmott, 19 U. C. R, 73. If the creditor by arrangement with the officer, in consideration of some responsibility incurred by him, delays his right to immediate payment of money collected, the sureties are discharged : Victoria M. F. Ins. Co. v. Davidson, 3 O. R. 378; but mere acquiesence in irregularities will not, in itself, effect a release: Mayor of Durham v. Fowler, 22 Q. B. D. 394; Shepley v. Hurd, 3 A. R. 549; Pirie v. Wyld, 11 O. R. 422; but any extension of time to the debtor, after judgment against the surety, will not release the latter; nor will such a release be effected if the debtor agrees to obtain the sureties' consent: Duff v. Barnett, 17 Gr. 187; nor if the creditor reserves his rights against the surety: Hall v. Thompson, 9 C. P. 257; Bell v. Manning, 11 Gr. 142. Such reservation may be shown by oral evidence: Currie v. Hodgins, 42 U. C. R. 601; Bank of Montreal v. McFaul, 17 Gr. 234. If one of the sureties be released the other will not be liable; Evans v. Bremridge, 2 Jur. N. S. 134.

Section

Section 35 But the court would endeavour to construe such release as a covenant not to sue: Dewar v. Sparling, 18 Gr. 633; the effect of which is not to release the other: Duck v. Mazen, (1892) 2 Q. B. 511; see Wolmershausen v. Wolmershausen, 62 L. T. 541.

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Several actions.—The liability of such surety is limited to the amount specified at the foot of the covenant. The court will not, however, restrain proceedings instituted against the surety, notwithstanding several actions had been brought against him, and the aggregate amount sought to be recovered greatly exceeds the amount of his liability: Craig v. Milne, 25 Gr. 259; Canada Guarantee Co. v. Milne, 25 Gr. 261. Where several executions have been obtained, an order may be made in Chambers that upon payment to the sheriff of the amount of the sureties' total liability and the costs, further proceedings will be stayed: Sinclair v. Baby, 2 P. R. 117. Relief probably could be obtained by a surety admitting his liability in whole or in part under the Rules respecting Interpleader: see Consolidated Rules 1141, 1150, 1153, 1154; McElheran v. London Masonic Ben. Assn. 11 P. R. 181; Reading v. School Board of London, 16 Q. B. D. 686; Anderson v. Barber, 13 P. R. 21; Leah v. Order of Chosen Friends, 14 P. R.; 27 L. J. N. S. 94.

Contribution.—Every surety who pays money is entitled to contribution from every other surety: DeColyar on Guarantees, 2nd Ed. 305-321; Berridge v. Berridge, 44 Ch. D. 168; Re Macdonald. Ex parte Grant, W. N. (1888) p. 130; and may enforce the judgment against the other for his just proportion: R. S. O. c. 122, ss. 2, 3, 4.

Death of Surety.—Upon the death of a surety, the officer must give anew a like security within one month from notification by the County Judge: see section 46. Until the new appointment, the personal representatives of the surety will be liable: R. v. Leeming, 7 U. C. R. 306; Provisional Corp. of Bruce v. Cromar, 22 U. C. R. 321: see, however, DeColyar on Guarantees, 2nd Ed. 348.

Rights of Surety against officer.—The surety will be entitled to complete indemnification by the officer, and to all securities held by the creditor, including any judgment against the officer, though obtained in the same action: R. S. O. c. 122, ss. 2, 3, 4. The judgment may be inforced without obtaining an assignment of it. In re McMyn, Lightbown v. McMyn, 33 Ch. D. 575. The surety is entitled to interest: Petre v. Duncombe, 2 L. M. & P. 107; but cannot recover the costs of defence unless authorized by the officer to defend: Gillett v. Rippon, Moo. & M. 406; unless his defence was reasonable: LeBlanche v. Wilson, 21 W. R. 109.

Statute of Limitations.—If the action against the officer be barred under section 290, no action can be maintained against the sureties: Pearson v. Ruttan, 15 C. P. 79.

Freeholders.—The sureties may be either legal or equitable freeholders. An overdue mortgage on a man's land would be no bar if the equity of redemption should be worth the amount prescribed. A freeholder is one who is seized of an estate or interest in lands or tenements which may endure for ever or is limited to endure for life or lives, or for some uncertain period that may last for his life or for some other person's without being confined to a limited number of years: Smith's Real and Personal Prop., 6th Ed., sec. 360. Persons in possessions of land, under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions, are not freeholders: Re Flatt and Prescott, 18 A. R. 1. As to what is an equitable freeholder see, per Osler, J.A., 18 A. R. 18 Although not freeholders of the county the sureties would be liable: Parks v. Davis, 10 C. P. 229. They are also liable although their prin-

cipal has neglected to execute the covenant: Miller v. Tunis, 10 C. P. 423; Sections so, also, if the covenant has not been filed: Parks v. Davis, supra.

Residents.—Where there is nothing to shew that the word is used in a more extensive sense, "resides" denotes where a person "eats, drinks or sleeps, or where his family or his servants eat, drink and sleep": R. v. North Curry, 4 B. & C. 959, per Bayley, J. It has a variety of meanings, according to the statutes in which it is used: see notes to sec.

"The term 'resident' does not necessarily import permanence, nor yet any definite stay": per Draper, C.J., La Pointe v. G. T. R. 26 U. C. R. 487; but it is submitted that it here means permanently resident.

If the sureties are not resident, they are nevertheless liable: Pearson v. Ruttan, 15 C. P. 79.

Within the county.-i. e., county or union of counties as the case may be.

In such sums.—Formerly it was held to be the duty of the Judge to fix the amount for which the sureties became bound, before the clerk or bailiff entered on his duties, and if the Judge should fail to perform his duty under this section, an action was maintainable against him, but not unless there was actual damage: Parks v. Davis, 10 C. P. 229. But the Act has since been amended (see sec. 31), so that the responsibility which formerly attached to the Judge is now merely "judicial," and not "administrative."

The sums in which the sureties are bound, should be regulated by the probable amount of business in the particular court. The usual practice is to require two sureties, but when the amount is large, it is not unusual to have three or four: 8 U. C. L. J. 121. Due regard should also be had to the increased jurisdiction of the court.

Under his hand .- The approval must be in writing: Wilson v. Wallani, 5 Ex. D. 155. The Judge usually approves and declares the covenant sufficient in his own hand writing, but it could be done in his name by the hand of another in his presence: Blades v. Lawrence, L. R. 9 Q. B. 374.

Sufficient.—The Judge should carefully examine the covenant, to see that it is a substantial (10 C. P. 424) compliance with the statutory form. It is not necessary, but it would be prudent to require affidavits of execution of the covenant and of justification of the sureties: R. S. O. c. 62, s. 12. For forms see Schedule of special forms. If the name of some proposed surety should have been struck out and another substituted, the Judge should reject the covenant; for if the other surety signed before the change he would be released: Hansard v. Lethridge, 8 T. L. R. 346; and the public are entitled to a covenant free from possible objections: Jones v. Macdonald, 14 P. R. 535.

36. Before a clerk or bailiff enters upon the duties of Before his office, the covenant of himself and sureties, approved battiff enters on as aforesaid, shall be filed in the office of the Clerk of the his duties, covenant Peace in the county in which the Division Court is situate; to be filed with Clerk and for filing and granting a certificate thereof, the Clerk Peace. of the Peace may demand from the clerk or bailiff the sum of \$1. R. S. O. 1877, c. 47, s. 28.

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A newly appointed clerk or bailiff must be particular not to do anything of an official nature until his covenant, duly approved and declared sufficient, has been filed with the clerk of the peace for the county.

Properly the covenant should be executed by the clerk or bailiff; but his omission to do so does not discharge the sureties who have executed it: Miller v. Tunis, 10 C. P. 423; Rastall v. The Attorney-General, 18 Gr 138.

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No paper is properly filed until marked "filed" by the public officer: Campbell v. Madden, Dra. R. 2. But see R. v. Gould, 6 O. S. 26.

Covenant to be available to suitors, etc.

87. The covenant shall be available to and may be sued upon in any Court of competent jurisdiction by any person suffering damages by the default, breach of duty or misconduct of such clerk or bailiff. R. S. O. 1877, c. 47, s. 29.

In any Court.—The question of which court, depends on the amount claimed, and the nature of the action; and if in the Division Court, also the place where the cause of action arose, or where the defendants reside.

See note to sec. 35, "Scope of the Covenant."

Certified copy of covenant to be received as evidence.

38. A copy of the covenant, certified by the Clerk of the Peace, shall be received in all Courts as sufficient evidence of the due execution, and of the contents thereof without further proof. R. S. O. 1877, c. 47, s. 30.

For form of certificate see Schedule of Special Forms.

All Courts.—This applies to criminal as well as civil courts: see B. N. A. Act, sec. 129.

Without further proof.—This mode of proving the covenant is only cumulative evidence, not substitutionary: Taylor on Evi. 8th Ed. 1319. See also Lynch v. O'Hara, 6 C. P. 259; Graham v. McArthur, 25 U. C. R. 478; Warren v. Deslippes, 33 U. C. R. 59. See also notes to sec. 45.

Entries of clerk or bailiff evidence against surety.

- **39.** (1) In an action, or proceeding against any person as the surety of a clerk or bailiff, the entries in the books required by law to be kept or which were so kept by such clerk or bailiff shall be *prima facie* evidence against the surety.
- (2) For the purposes of this section the words "clerk or bailiff" shall be held to include a person who having been a clerk or bailiff has ceased to be such clerk or bailiff. 48 V. c. 14, s. 9.

The entries here mentioned are only prima facie evidence, and may be contradicted if untrue. Prior to the introduction of this section, the admissibility of entries in the books kept by a Division Court clerk or bailiff, in an action against his sureties was doubted. It was held, in

Middlefield v. Gould, 10 C. P. 9, that such entries were admissible Sections against the sureties. In Victoria M. F. Ins. Co. v. Davidson, 3 O. R. 378, the correctness of the law in Middlefield v. Gould was questioned, but the authority of that case was recognized in The Corp. of Welland v. Brown, 4 O. R. 217, in which entries made by a town collector of taxes in his roll, were admitted as evidence against his sureties. It was also held in a recent lrish case, that the entries made by a rate collector in the accounts kept by him as such collector, were admissible in evidence against his sureties: Abbeyleix Guardians v. Sutcliffe, 26 L. R. Ir. 332. This section now settles that entries in the books "required by law to be kept, or which were so kept by such clerk or bailiff," are prima facie evidence against the surety.

40. If a surety in such covenant dies, becomes resident it surety out of Ontario, or insolvent, the County Judge shall notify surety to be furthe clerk or bailiff for whom such person became surety, nished. of such death, departure or insolvency, and the clerk or bailiff shall within one month after being so notified, give anew the like security, and in the same manner as hereinbefore provided, or forfeit his office of clerk or bailiff. R. S. O. 1877, c. 47, s. 31,

Resident out of Ontario.—See note to sec. 35 and notes to sec. 81.

Insolvent.—There is no provision in the Act or Rules for ascertaining the fact of insolvency; and difficulties may be occasioned in acting upon this section: see Temple v. Stock Exchange, 8 O. R. 705.

Where a contract was to terminate in the event of the insolvency of the vendee, it was held, that insolvency meant a general inability to pay debts, and not taking the benefit of an Insolvent Debtors' Act: Parker v. Gossage, 2 C. M. & R. 617; Biddlecombe v. Bond, 4 A. & E. 332.

One month.—The month would not commence to run until the day after notice was given: R. v. Justices of Middlesex, 7 Jur. 396; McLean v. Pinkerton, 7 A. R. 490; Radcliffe v. Bartholomew, (1892), 1 Q. B. 161.

Forfeit his office. By neglect of the officer to furnish the fresh security his office becomes forfeited,

41. [Any surety for a clerk or bailiff who intends to Procedure withdraw from his responsibility may give notice in sureties of clerk or writing of such his intention to the clerk or bailiff, as the bailiff discase may be, and to the Judge of the county court, which suretyship. notice may be served personally or left with some grown up person at the office or place of residence of the person to whom it is addressed, or may be deposited in Her Majesty's post office pre-paid and registered and addressed to such person at his usual post office address; and in such case the Judge shall forthwith on receipt thereof duly notify such clerk or bailiff, and the clerk or bailiff shall

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under penalty of forfeiture of his office (in addition to the suspension hereafter mentioned) furnish the security of a new surety in lieu of the surety so giving notice, and shall have the necessary new bond or covenant approved by the Judge and completed within one month after such notices. have been so given to him and the said Judge; and in case such bond or covenant shall not be so approved and completed within such month, the said Judge shall forthwith suspend such clerk or bailiff and report such suspension and the cause thereof to the Provincial Secretary and the Inspector of Division Courts, and all accruing responsibility on the part of the person giving such notice shall cease from and after the expiration of five weeks from the day on which such notices were so given, or the later of such notices if not given on the same day. 55 V. c. 11, s. 2.

The original provision for the relief of a surety was repealed by 55-Vic. (O.), c. 11, s. 2, and the one here given substituted for it.

Any surety.—See notes to section 37.

Notice in writing.—See notes to section 93.

May be served.—See notes to sections 81, 99 and 101.

Within one month.—See notes to section 40.

At the expiration of five weeks.—The liability, except as to all past transactions and matters, ceases at the expiration of five weeks from the time of giving notice.

See "Scope of the covenant," notes to sec. 37.

42. Sections 15 to 20, both inclusive, of The Act Sects, 15-20 of Rev. Stat. c. 15 respecting Public Officers, shall, with the substitution of to apply to "The Judge of the Court" for "The Lieutenant-Govgiven by clerks and ernor," apply to securities given by a clerk or bailiff of a bailiffs. Division Court. R. S. O. 1877, c. 47, s. 33. See also Cap. 15, 88. 24-27.

The sections referred to in chapter 15, R. S. O., have reference to the security to be given by a public officer, and are made applicable to Lieut.-Gov. Division Court officers. The following are the sections:

ernor may certain Cases.

15. (1) The Lieutenant-Governor in Council may remit the forfeiture penalty in or penalty in any case in which the failure to give security, or to register and deposit any bond or security under this Act, has not arisen from the wilful neglect of the person bound to give, register or deposit the same.

or may exfor giving security, etc.;

(2) If it appears to the Lieutenant-Governor that the period hereinbefore limited for giving the security of a new surety as aforesaid is, in consequence of particular accidents, casualties, or circumstances, insufficient, or that by reason of the distance or loss of letters, or illness, or the refusal of any surety to give the security, or of such surety not being Sections deemed eligible and being rejected, or any other accident or casualty, further time would be necessary to enable the security of such new surety to be given, the Lieutenant-Governor in Council may allow such further period for giving the security of such new surety as appears to him reasonable and proper.

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- (3) But such extended period shall in no case exceed two months but not beyond the period allowed by this Act, and the precise period proposed to more than be allowed, together with the special grounds for allowing the same, shall months. be either entered in the book in which the original security has been and an registered, or endorsed on the back of the original bond or other security entry thereof itself; and the person required to give the security of such new surety must be shall not be subject to any forfeiture or penalty for not giving the same made. within the time limited by this Act, if he gives it within the extended period so allowed as aforesaid. R. S. O. 1877, c. 15, s. 15.
- 16. The Lieutenant-Governor may approve of the security given by Security any public officer or the affidavit of justification made by his sureties may be apand filed by him, although the same has been given or filed after the time although limited by this Act; and in such case the office or commission of such given after public officer shall be deemed not to have been avoided by such default, time but to have remained and to remain in full force and effect. R.S.O. 1877, limited. c. 15, s. 16.

- 17. No act of any public officer of this Province whose security has void by been given, or registered, or deposited, or the affidavit of justification of delay in whose sureties has been filed after the time limited by this Act, shall, by security, such default, be void or voidable. R. S. O. 1877, c. 15, s. 17.
- 18. Where the securities of the principal and sureties have been Securities executed at different times (whether they were taken in one and the executed at same bond, deed or other instrument, or in different ones), the period different times, limited for registering and depositing such securities shall be estimated within from the time of execution thereof by the person who was the last to what time execute the bond, deed or other instrument, or the last bond, deed or to be registered. other instrument, as the case may be. R. S. O. 1877, c. 15, s. 18.
- 19. No neglect, omission or irregularity in giving or receiving the Neglect bonds or other securities, or in registering the same within the periods or etc., not to in the manner prescribed by this Act, shall vacate or make void any bond or bond or security, or discharge any surety from the obligations thereof, discharge R. S. O. 1877, c. 15, s. 19.
- 20. All bonds or other securities hereby required to be registered and Proper deposited, shall be registered and deposited by the proper officer, notwith- officer to standing the period prescribed for registering and depositing the same and dehas expired; but no registering and depositing of any bond or other posit security shall be deemed to waive any forfeiture or penalty, or shall although exempt the person on whose behalf the same are registered and deposited, time ex from any forfeiture or penalty, under any of the provisions of this Act. pired. but R. S. O. 1877, c. 15, s. 20.
- 43. Nothing hereinbefore contained shall discharge or penalty. exonerate any of the parties to such former covenant from Liability of former their liability on account of any matter done or omitted sureties, before the renewal of the covenant as aforesaid. 1877, c. 47, s. 34.

not to

Sections 43-44 It is submitted that this section is only declaratory of the Common Law: R. ex. rel. Flanagan v. McMahon, 7 U. C. L. J. 155; see also 9 U. C. L. J. 10. The taking of a fresh covenant could not discharge any liability on the former one.

See also notes to section 37.

Clerk's Duties.

Clerk to issue summonses and furnish copies, etc.

44. The clerk shall issue all summonses, which summonses shall be by him filled up and shall be without blanks either in date or otherwise at the time of delivery for service; he shall also furnish copies of the same with the notice thereon, according to the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts. R. S. O. 1877, c. 47, s. 36.

Issue all summonses. - The summons is the commencement of the action: (Rules 9 to 17 inclusive) and no valid decision or judgment can be given unless a summons is issued and served (Thorburn v. Barnes, L. R. 2 C. P. at p. 401) or waived by the defendant's appearance: Merchants Bank v. Van Allen, 10 P. R. 348; R. v. Smith. L. R. 1 C. C. 110; Blake v. Beech, 1 Ex. D. 320; Stoness v. Lake, 40 U. C. R. 320 at p. 327. In Bonaker v. Evans, 16 Q. B. 171, Parker, B., says: "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence, by a judicial proceeding, until he has had a fair opportunity of answering the charge against him, unless indeed, the Legislature has expressly or impliedly given an authority to act without that necessary preliminary." In Cooper v. The Board of Works for the Wandsworth District, at p. 190 of 14 C. B. N. S., Willes, J., says: "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds, and that that rule is of universal application and founded on the plainest principles of justice:" see also Bullen v. Moodie, 13 C. P. 126; 2 E. & A., 379; Nicholls v. Cumming, 1 S. C. R. 395; R. v. Cheshire Lines Com., L. R. 8 Q. B. 344; R. v. Archbishop of Canterbury, 1 E. & E. 545; Tucker v. Collinson, 16 Q. B. D. 562; R. v. College of Physicians, 44 U. C. R. 146; Marshall v. McRae, 17 A. R. 139 reversed, on the construction of the agreement, 19 S. C. R. 10.

A summons should not be issued by the clerk, where clearly the court has no jurisdiction. It is no part of his duty to enter into nice questions of jurisdiction; but it would be his duty to see that the process of the court is not used for improper purposes or in an illegal manner. Should a person, for instance, enter a suit against a defendant alleged to be living in the city of New York, a clerk should not receive it nor issue a summons. A resident of a foreign jurisdiction cannot be sued in our Division Court: Ontario Glass Co. v. Swartz, 9 P. R. 252; In re Guy v. G. T. R. Co., 10 P. R. 372. It may be that a defendant might waive the absence of jurisdiction created by non-residence by appearing, and not raising the question: In re Guy v. G. T. R. Co., 10 P. R, 372; Hambly v. Betteley, 6 Q. B. D. 63; and especially at p. 65 per Selborne, L.C.

If any Division Court had jurisdiction against one residing out of Ontario the question would be different: Re Mead v. Creary, 32 C. P. 1; Re Knight v. Medora, 14 A. R. 112. See also section 70 and notes.

Delivery for service.-It should be a perfect process when delivered Sections to the officer for service.

The duties imposed on the clerk are imperative and he is bound to perform them at the risk of a mandamus: R. v. Fletcher, 2 E. & B. 279; In re Linden v. Buchanan, 29 U. C. R. 1.

The notice thereon.—See Forms of Summonses and Rule 15.

45. The clerk shall cause a note of all summonses, Clerk to all notices filed by any party to the action, orders, judg-record of ments, executions and returns thereto, to be from time to judgments. time fairly entered in a book to be kept in his office; and shall sign his name on every page of the book, and the signed entries, or a copy thereof certified as a true copy by the clerk, shall be admitted in all Courts and places as evidence of such entries, and of the proceedings referred to thereby, without further proof. R. S. O. 1877. c. 47, s. 37; 49 V. c. 15, s. 5.

Shall sign his name.—This is imperative, and its omission is one of the most serious cases of neglect on the part of the clerk. If omitted, perhaps neither the original entries, certainly not copies, could be given in evidence. The statute says, "such signed entries": see ?. v. Rowland, 1 F. & F. 72. The object is to have the clerk not only cause a note of all summonses, orders, judgments, executions and returns thereto to be, from time to time, fairly entered in the Procedure Book; but also, all notices, filed by any party to the action to be entered there.

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Each page of the Procedure Book should be signed by the clerk. As soon as an entry is made on a page, such page should be signed by the. clerk.

Certified copy to be evidence.—For from of certificate, see schedule of forms.

This section is a pretty close transcript of section 111 of the English statute of 9 & 10 Vic. cap. 95; continued by s. 28, of The County Courts Act, 1888, 51 & 52 Vic. c. 43. It has been decided under that Act, that a minute of the proceedings made by the clerk pursuant to this provision, is conclusive evidence of them, even though the Judge gives evidence to the contrary: Dews v. Riley, 11 C. B. 434. The clerk's book, or a certified copy of entries from such book, is the best, and therefore the only evidence: of proceedings: R. v. Rowland, 1 F. & F. 72, per Bramwell, B.; Roscoe's. Crim. Ev., 11th ed. pp. 3 and 160. An entry in the Procedure Book, "struck out for want of jurisdiction on the ground of a disputed title having been sworn to," is not evidence of a judgment in replevin: Tubby v. Stanhope, 5 C. B. 790. The entries made by a clerk in pursuance of this section are evidence against the sureties of such clerk: Middlefield v. Gould 10 C. P., at page 14: see Carmarthen and Cardigan Ry. Co. v. The Manchester and Milford Ry. Co., L. R. 8 C. P., at page 691. per Bovill, C.J.; sec. 39 and notes.

Mection 46

Clerks to issue executions, tax costs and keep account of fines, etc.

46. The clerk shall also issue all warrants and writs of execution filled up and without blanks; he shall tax costs, subject to the revision of the Judge, register all orders and judgments of the court, and keep an account of all fines payable or paid into court, and of all suitors' moneys paid into and out of court, and shall enter an account of all such fines and moneys in a book to be kept by him for that purpose, which book shall be open to all persons desirous of searching the same, and shall at all times be accessible to the Judge and Inspector. R. S. O. 1877, c. 47, s. 38.

Taxation of costs.—See section 207 and notes thereto, as to the question of costs.

"As soon after the court as possible, the clerk should receive from the successful party an affidavit of his disbursements to witnesses. The affidavit can be made before the clerk of any Division Court and forwarded by mail or otherwise to the clerk in whose court the judgment was rendered, and may be by the party or his agent. At latest, the clerk should be put in possession of it the day before the execution is due, according to the order of the court; as he has commonly general directions at the time of entering the suit, to proceed and collect the amount claimed, which dispenses with a special direction to sue out execution, when the time given by the Judge has expired ": 1 U. C. L. J. 81. For form of affidavit of disbursements, see Form 112. Where execution is "forthwith," the clerk should afford the successful party a reasonable time in which to put in this affidavit; and in case of a nonsuit or judgment for defendant, the defendant is not, it is submitted, restricted to time. A mandamus will lie, to compel a clerk to issue execution: R. v. Fletcher, 2 E. & B. 279.

It is submitted that the proper practice for revision of taxation is for the party dissatisfied to give notice to the opposite party and the clerk of the court of his intention to have the Judge revise the taxation of costs on a certain day and hour. A reasonable time should be allowed. The papers in the case should be laid before the Judge, and in the event of the parties not appearing, an affidavit of service of the notice of revision. Payment of costs without protest does not prevent a revision: Kormann v. Tookey, 6 P. R. 112. If an affidavit of payment of witness fees should be filed, and it should appear on revision, that they had not been paid, they would be disallowed: Hornick v. Tp. of Romney, 11 C. L. T. 329.

Of course the Judge could revise the costs on summons or appointment made by him. The clerk should exercise his best judgment on taxation, and not leave for the Judge on revision, that which he should properly do himself: Simmons v. Storer, 14 Ch. D. 154; Hargreaves v. Scott, 4 C. P. D. 21.

Enter an account .- See Form 5.

47. The clerk of every Division Court shall, from sections time to time, as often as required so to do by the County Clerks to Crown Attorney of his county, and at least once in every deliver to three months, deliver to him, verified by the affidavit of Crown the clerk sworn before the Judge or a Justice of the Peace a verified of the county, a full account in writing of all fines levied fines. by the court, accounting for and deducting the reasonable expenses of levying the same, and any allowance which the Judge may make out of such fine, in pursuance of the power hereinafter given. R. S. O. 1877, c. 47, s. 40.

48. The clerk of every Division Court, when required Clerks to by the Judge, shall, from time to time, furnish him with a Judge with full account, in writing, verified by the oath of the clerk, account of moneys sworn before the Judge or a Justice of the Peace, of the paid in and moneys received into and paid out of the court by any Court. suitors or other parties under any orders, judgments or process of the court, and of the balance in court belonging to any such suitors or parties. R. S. O. 1877, c. 47, s. 41.

This refers to moneys received from all sources as well as fines and forfeitures.

49. (1) The clerk of every Division Court shall, annu-Clerk anally in the month of January, make out a correct list of all make list sums of money belonging to suitors in the court, which money in have been paid into court and have remained unclaimed for six years before the last day of the month of December then last past, specifying the names of the parties for whom or on whose account the same were so paid.

(2) A copy of such list shall be put up and remain at Copy of all times in the clerk's office and, during court hours, in put up in court room some conspicuous part of the court house, or place where and in clerk's the court is held. R. S. O. 1877, c. 47, s. 43.

[As to return of fees by Division Court Clerk, see cap. 15, ss. 28, 29.]

In the month of January.—That is during that month, and properly not before it commences nor after it expires: Beaty v. Fowler, 10 U.C.R.

A correct list .- See Form No. 116.

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Section 50

Disposal of Books and Papers when Clerk Changed.

Upon resignation, removal, or death of Clerk. County Crown become possessed of papers.

50. (1) All accounts, moneys, books, papers, and other matters in the possession of the clerk by virtue of or appertaining to his office, shall, upon his resignation, removal or death, immediately become the property of the County Attorney to Crown Attorney of the county in which the division is situate, who shall hold the same for the benefit of the public until the appointment of another clerk, to whom he shall deliver over the same, but not until such clerk and his sureties have executed and filed the covenant hereinbefore mentioned. R. S. O. 1877, c. 47, s. 44.

Punishment of person wrongfully holding moneys books or papers.

(2) No person shall wrongfully hold or get possession of such accounts, moneys, books, papers and matters aforesaid, or any of them; and upon the declaration in writing of the Judge presiding over the Division Court for the time being, that a person has obtained or holds such wrongful possession thereof, and upon the order of a Judge of the High Court, founded thereon, such person shall be arrested by the sheriff of any county in which he is found, and shall by such sheriff be committed to the common gaol. of his county, there to remain, without bail until the High Court, or a Judge thereof, is satisfied that such person has not and never had nor held any such matters or moneys, or that he has fully accounted for or delivered up the same to the County Crown Attorney, or until he be otherwise: discharged by due course of law. C. S. U. C. 19, s. 48.

County Attorney to act as clerk when office of clerk is vacant.

[(3) Upon the resignation, removal or death of the clerk of a Division Court, and until such time as his. successor is appointed, the County Crown Attorney of the county in which the division is situate, shall perform all the duties, and shall be for the time being, and until the successor is appointed, the clerk of such Division Court.] 52 V. c. 12, s. 4.

Upon his resignation.—See section 27 and notes.

Immediately.—It is submitted that from the object and context of this clause "immediately," must here be read instantly. See notes to

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section 20, ante: Thompson v. Gibson, 8 M. & W. 281: Forsdike v. Sections Stone, L. R. 3 C. P. 607; Stroud, 365.

County Crown Attorney .- R. S. O. c. 79.

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Sureties have executed .- See sections 36 and 37 and notes thereto.

Sub-sec. 2.—This sub-section has been taken from section 48 of the Division Courts Act to be found as chapter 19 of what was the Consolidated Statutes of Upper Canada.

This is a quasi-criminal proceeding, and in the revision of the statutes, it will be observed, that difficulty must have been experienced in moulding the clause so as to bring it within the authority of the Provincial Legislature. It is submitted that it is within the powers of the Provincial Legislature under sub-section 15 of section 92 of the B. N. A. Act authorizing the Legislature to exclusively make laws for the "imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects" over which the province has jurisdiction: see R. v. Hodge, 9 App. Cas. 117; R. v. Wason, 17 A. R. 221. If ultra vires the original section would remain in force.

Wrongfully.- The gist of the offence consists in the word "wrongfully," that is, in the infringement of a right: R. v. Davies, 4 L. T. N. S. 559; R. v. Brent, 1 Den. C. C. 157; Mogul Co. v. McGregor, 23 Q. B. D. 598, at page 612; Stroud 899.

Order of a Judge.—It must not be conditional: Chichester v. Gordon, 25 U. C. R. 527; Woltz v. Blakely, 11 P. R. 430.

Common gaol of the County.—Cannot be to the gaol of any other county than that of the sheriff arresting him: Switzer v. Brown, 20 C. P. 193; In re Weatherly, 4 P. R. 28; Schneider v. Agnew, 6 P. R. 338. The person charged must either disprove the charge in the way pointed out by this sub-section, or stand his trial or be discharged on Habeas Corpus.

Sub-sec. 3.—This new sub-section imposes entirely new duties on the County Crown Attorney, which would be enforceable by mandamus. See notes to section 4. The County Crown Attorney is not required to give security.

Duties of Bailiffs.

51. The bailiffs shall serve and execute all summonses, Bailiffs to serve writs. orders, warrants, and writs delivered to them by the clerk for service, whether bailiffs of the court out of which the same issued or not, and shall so soon as served return the same to the clerk of the court of which they are respectively bailiffs; but, subject to the provisions of section 82, they shall not be required to travel beyond the limits of their division, or be allowed to charge mileage for any distance travelled beyond the limits of the county in which the court of which they are respectively bailiffs is situated R. S. O. 1877, c. 47, s. 45.

Duties of Bailiffs.—It is highly improper for the bailiff to canvas parties for their votes in political elections: *per Morrison*, J., North Victoria Election Case, 1 Hodgins' E. C. 612.

"Bailiffs should so regulate their proceedings that at proper intervals they may attend at the clerk's office to receive summonses intended for service. Clerks should assist bailiffs of their courts in seeing that the originals and the copies of summonses and claims correspond. Every care should be given to ascertain where the several defendants live, and if there be more than one person of the same name in the locality, which person the summons is intended for. This information is usually given by plaintiffs to the clerk, or is noted in the claim handed in for suit, and before the papers are taken from office, should be obtained. In courts where the business is large, it will be absolutely necessary for the bailiffs to make out a list of the summones received with columns for date and mode of service; it would otherwise be impossible to work to advantage, or to make proper returns to the clerk: 2 U. C. L. J. 85. A bailiff doubtless may call in assistance, when necessary, in the execution of his duty; and every such assistant, acting under the direction of his principal, will be within the protection of the statute, and be held in law to be the principal's deputy while doing any particular act—as in securing, keeping possession of property seized, or the like, under the bailiff's direction; indeed such assistants are recognized in several sections of the statute. Section 195 (now 285) provides that no action is to be brought against a bailiff 'or against any person acting by his orders and in his aid,' etc.; and in sections 184 (now 276), 196 (now 286) and 197 (now 287) assistants are referred to. It does not appear essential to due service of the ordinary summons that it should be made by the bailiff of the court; if duly served by any literate person it is apprehended it would be sufficient, though no charge could be taxed for the service or mileage, unless effected by an authorized person. In practice it is not unusual to appoint a person a bailiff (pro hac vice) to effect a particular service, where the circumstances warrant such a course; and in that case the regular expense of service would be chargeable in the usual way. But all process of execution and warrants must be executed by the bailiff personally:" 9 U. C. L. J. 68 & 69.

A bailiff should not pursue too rigid or too lax a course in the performance of his duty. He will best consult the interests of suitors and observe his duty most who quietly but firmly performs his unpleasant work, not with an oppressive hand, but in a kindly and becoming manner, neither courting the favor of the creditor nor exciting the ill-will of the unfortunate debtor. Reasonable forbearance will frequently be the means of obtaining a debt, while harshness and severity will often produce a fruitless execution.

Bailiffs cannot be too careful in seeing that their executions are promptly executed and returned.

Service of Process.—The bailiff is made responsible for the service and execution of all process, but he is not bound to travel out of his own division. If he intends to refuse to serve or execute any process on this ground, he should so notify the clerk and refuse to receive the same. He has no rights in any other county, except the case falls within section 82. He may, however, effect service in another county, but cannot charge mileage for any distance travelled beyond his county: Ladouceur v. Saiter, 6 P. R. 305.

Return.—If not returned within six days after service, the bailiff forfeits his fees (Rule 90). The six days excludes the day of service: Young v. Higgon, 8 M. & W. 49.

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52. Every bailiff shall exercise the authority of a constable during the actual holding of the court of which he Bailiff to is a bailiff, with full power to prevent breaches of the peace, exercise duty of riots or disturbances within the court-room or building in constable during which the court is held, or in the public streets, squares, or holding of Court. other places within the hearing of the court, and may, with or without warrant, arrest all parties offending against the meaning of this clause, and forthwith bring the offenders before the nearest Justice of the Peace, or any other judicial officer having power to investigate the matter or to adjudicate thereupon. R. S. O. 1877, c. 47, s. 46.

Constable.—As to what are "streets, squares or other places" within this section: see Nutter v. The Accrington Local Board of Health, 4 Q. B. D. 375; R. v. Wellard, 14 Q. B. D. 63; Attorney-General v. Toronto, 10 Gr. 437; Stroud 762, See also (1891) 2 Q. B. 212.

A bailiff has the authority of a constable in the performance of his duty under this section, but no greater authority.

The power of a constable to apprehend and detain offenders is much greater than that of private persons. They may exercise all the powers of the latter and their right to apprehend persons indicted for felony is undoubted: 1 East. P. C. 298-300. Constables can do that which private persons cannot do, apprehend persons on a reasonable suspicion of felony: Samuel v. Payne, Doug. 359; I East, P. C. 301; 2 Hale, P. C. 83, 84, 89. It has always been considered that a charge of felony made by a person not manifestly unworthy of credit is sufficient to justify the apprehension: 1 East, P. C. 302. The peace officer should always make such inquiries as teaches him are best suited to ascertain the nature of the offence.

A constable is justified in arresting any person committing a breach of the peace, or any offence punishable either by indictment or summary conviction: R. S. C. c. 174, s. 24. He cannot arrest after a breach of the peace, without continued pursuit, if all danger of an affray is past: Roscoes Crim. Evi., 11th Ed., 246.

Private persons are sometimes bound to give aid and assistance to a peace officer, and are liable to indictment if they refuse: R. v. Sherlock, L. R., 1 C. C. 20. And if they assist they are protected equally with the constable who is making the arrest: Pollock on Torts, 101, 102.

A constable is not excused if he arrest the wrong person. He must lay hands on the right person at his peril, the only exception being on the principle of estoppel, where he is misled by the party's own act: Glasspoole v. Young, 9 B. & C. 696; Dunston v. Paterson, 2 C. B. N. S.

A constable has no right to handcuff a prisoner before conviction unless he has attempted to escape, or it be necessary to do so to prevent him from escaping: Hamilton v. Massie, 18 O. R. 585; Wright v. Court, 4 B. &. C. 596.

Breaches of the peace.—These are offences against the public, which are either actual violations of the law, or constructively so, by tending to make others break it: Wharton, 101.

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bailiff rvice:

Riots.—A riot is defined to be a tumultuous disturbance of the peace by three persons or more assembling of their own authority with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful: Wharton, 650.

Disturbances.—Anything which would annoy or interfere with the Judge, or any of the officers of the court, or others engaged in any business before the court, would be a "disturbance" within the meaning of this part of the section: Wharton, 243.

Squares.—It was held under the Statute 27 Geo. III. c. 28, s. 5, in respect to the word "square," that such word meant all rectangular figures only: Attorney-General v. Cast Plate Glass Co., 1 Anst. 39. But it is submitted that any open area in a city, town or village dedicated to the uses of the public would be a "square" within the meaning of this clause.

Within a Reasonable Time.—Toms v. Wilson, 4 B. & S. 455.

Nearest Justice.—This being a penal statute, must be construed with reasonable strictness. In R. v. Harvey, 1 Wils. "near" was so construed in a penal statute, yet not equivalent to "next," the court remarking that "there must be a reasonable vicinity of which the court will judge."

In cities and towns where there is a police magistrate, he would be the proper person: R. S. O. c. 72. Where the offence is one not triable summarily, then of course he is to "investigate the matter" only, but if the subject of summary conviction, then he should "adjudicate" upon it. If the disturbances, etc., occur in the court-room, or while the court is sitting, and amount to an insult to the administration of justice, the Judge may exercise his power of committal under section 275: Re Johnson, 20 Q. B. D. 68.

Fees of Clerks and Bailiffs, etc.

Clerks and bailiffs to be paid by provided and allowed by the general rules or orders applifees.

cable to Division Courts, heretofore in force or hereafter to be made by the Board of County Judges, and approved under the provisions of section 297 of this Act.

Fees of appraisers.

(2) Until otherwise provided by the general rules or orders, the fees to be taken and received by appraisers shall be as follows:

R. S. O. 1877, c. 47, s. 47.

Table of (3) A table of the fees shall be hung up in some confees to be hung up in spicuous place in the offices of the several clerks. R. S. O. clerk's office. 1877, c. 47, s. 48.

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Fees .- See notes to the tariff of fees of clerks and bailiffs. The table Bentions of fees contains all the services for which clerks and bailiffs are entitled to charge. No local tariff or user in any particular county can give any additional right: In re Dartnell and The Quarter Sessions of Prescott and Russell, 26 U. C. R. 430; Rule 164.

Sub-Sec 3.—A copy of the table of fees should not only be hung up in the clerk's office, but should be kept so hung up and exposed to the

54. The fees upon every proceeding shall, on or before Fees to be paid by such proceeding, be paid in the first instance by the plain-plaintiff or tiff, or other party at whose instance the proceeding takes in first instance. place. R. S. O. 1877, c. 47, s. 49.

Proceeding.—It is submitted that the word "proceeding" here should receive a liberal interpretation, and must be held to apply to every act done by a clerk to which a fee is by the tariff attached. For instance, taxing costs has been held to be a "proceeding" under a statute not more extensive in its meaning than this: R. v. The London, Chatham and Dover Ry. Co., L. R. 3 Q. B. 170; Stroud, 617. This would include a "proceeding" as well before judgment as after: Ross v. Fare-well, 5 C. P. 101. See Meloche v. Reaume, 34 U. C. R. 606; Caspar v. Keachie, 41 U. C. R. 599. Where the clerk is entitled to a fee which has not been paid him, and which he may not have given credit for, the Judge would probably refuse to hear the matter: 4 U. C. L. J. 81, 82. If the clerk gives credit for fees, he trusts to the promise of the party and waives the benefit of this section. It is submitted, however, that moneys coming into his hands for a particular person would, as against that person, be deductable from or chargeable with the fees so due by him to such a clerk: 10 U. C. L. J. 291. A person entering a suit for another, and becoming responsible for costs, should receive the money when made, independently of any claim the clerk might have against the suitor. The clerk is not bound to pay a defendant who has succeeded, his witness fees out of money deposited by plaintiff towards costs: 4 U. C. L. J. 178. If a clerk is indebted to a bailiff for fees in other suits, the bailiff has, on that account, no right to withold moneys collected by him: Rule 97.

55. If the fees are not paid in the first instance by How the plaintiff or party on whose behalf such proceeding is to be had, the payment thereof may, by order of the Judge be enforced by execution in like manner as a judgment of the court, by such ways and means as any debt or damages ordered to be paid by the court can be recovered. R.S.O. 1877, c. 47, s. 50.

By order of the Judge.—This is a summary proceeding and must be strictly exercised: Fletcher v. Calthorp, 6 Q. B. 880-891. The defaulting party must have an opportunity of being heard: See notes to section 44. There should be a summons to shew cause: Bullen v. Moodie, 13 C. P. 126, 2 E. & A. 379. For forms of notice and order in such cases, see appendix of forms hereto.

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Sections 55-56a

There is nothing in the section to prevent the notice being made returnable at the Judge's Chambers in the county town; but it is more consistent with the spirit of Division Court law to make it returnable at some sittings of the court in which the suit was entered or proceeding taken, or in the party's own division. The motion is usually made on behalf of the clerk, and should be founded on an affidavit of facts. If an order be made, execution may, after the entry of such order in the Procedure Book, issue upon it, in the same way as in an ordinary judgment: See notes to section 212. The notice should be served a reasonable time before its return. It is submitted that the law regulating the time for service of summonses does not apply to a case under this section. What is a reasonable time must depend on the circumstances of each particular case. There should be an affidavit of personal service of the notice or that it came to the knowledge of the person for whom it is intended: Ward v. Vance, 3 P. J. 130.

The order need not be served. No provision is made for costs of this proceeding, therefore the order cannot include costs: Re Young, 14 P. R. 303.

The provisions of section 88 do not appear to apply to this proceeding. It is not "bringing any action in the division of which he is the clerk or bailiff," within the latter part of that section, to take this statutory mode of collectifig costs.

Bailiff's fees to be paid to clerk before execution issues.

56. At the time of the issue of the execution, the bailiff's fees thereon shall be paid to the clerk, and shall by him be paid over to the bailiff, upon the return of the execution, and not before, but if the bailiff does not become entitled to any part, or becomes entitled to a part only, of such fees, the whole or surplus shall on demand be by the clerk repaid to the plaintiff or party from whom the fees were received. R. S. O. 1877, c. 47. s. 51.

This section is for the protection of the bailiff. What "the fees thereon" may be is a matter of uncertainty. If he an find nothing to seize his fees must be trifling; mileage in such cases not being allowed. Should he seize any property, it should be sufficient to meet his fees. The clause, however, has more especial reference to a case where, after seizure and before sale, the case is settled between the parties to the prejudice of the bailiff.

In an action against a bailiff and his surety for not returning an execution within the proper time, it is no answer, after the bailiff received the execution without exacting pre-payment of his fees, to set up the non-payment in defence of the action: Bank of Ottawa v. Smith, 16 L. J. N. S. 223.

Right of bailiff to ecution when action settled.

56a. [Where in any Division Court action a bailiff has balling to fees on ex-seized goods under and by virtue of a writ of execution or attachment, and the action is afterwards settled between the parties thereto, or the defendant in the action makes an assignment for the general benefit of his creditors, the said

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ff has ion or tween ces an e said bailiff shall until his fees and disbursements upon the said sections writ are fully paid and satisfied, have a lien therefor uponso much of the said goods as will reasonably satisfy the same, but in the event of a dispute as to the proper amount of said fees and disbursements, the amount charged therefor may be paid into Court until the proper amount shall be certified by the Judge, and on such payment into Court the said lien shall cease and determine. 52 V. c. 12, s. 2.

This section provides for two cases: (1) settlement, (2) assignment for benefit of creditors.

The bailiff must first make an effective seizure, which becomes inoperative by the settlement or assignment. The assignment must, it is submitted, be under R. S. O. c. 124, which takes precedence over executions. It has been held that section 9 of that Act is ultra vires of the Ontario Legislature as regards executions from superior courts: Union Bank v. Neville, 21 O. R. 152. No power is given to the bailiff to sell for the realization of his lien. Without this provision the bailiff would have no lien: Sneary v. Abdy, 1 Ex. D. 299, and the creditor could not add the cost of execution or bailiff's fees to his debt: Marquis of Salisbury v. Ray 8 C. B. N. S. 193; In re Long, Ex parte Cuddeford, 20 Q. B. D. 316.

57. If the bailiff neglects to return any process or exe-Bailiff to forfeit fees, cution within the time required by law, he shall for each if he neglects such neglect forfeit his fees thereon, and all fees so forfeited writ. shall be held to have been received by the clerk, who shall keep a special account thereof, and account for and pay over the same to the County Crown Attorney, to be paid by him over to the Provincial Treasurer, to form part of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 52.

Within the time required by law.—See notes to section 220 as to

when an execution should be returned.

We have only to reiterate the opinion previously expressed, that bailiffs should be vigilant in making return to process or execution within the proper time, and where it is not done, the forfeiture of fees should be exacted by the clerk. The latter may endanger his position by a disregard of his duty in that respect.

58. No clerk or bailiff shall directly or indirectly take Clerk or bailiff not. or receive any commission, charge, expenses, fee or reward to collect on comfor or in connection with the collection of any debt or mission. claim which has been or may or can be sued in the court for which he is so clerk or bailiff, except such fees as are provided by any tariff of fees under this Act. 43 V. c. 8, s. 37.

Sections 58-59 Directly or Indirectly.—It seems that the addition or omission of the words "directly or indirectly" to the offence of an officer of a corporation being "interested" in a contract with his corporation is immaterial: Todd v. Robinson, 14 Q. B. D. 739; but see Stewart v. Macdonald, 11 L. J. N. S. 19.

The language of the section is strict, and should be carefully observed. The clerk and bailiff are strictly prohibited from entering into any arrangement by which they are to receive a commission for the collection of any debt or claim which might be the subject of a suit in the court of which they are clerk and bailiff. The object of the section is to prevent clerks and bailiffs from being collectors of debts. These officers should be perfectly impartial, and it was found that such impartiality could not be expected in one who was interested in a suit in court beyond the due performance of his duty.

The execution of a landlord's warrant, or of a power of sale in a chattel mortgage would not, it is submitted, be a contravention of this section: Maxwell on Stats.

Fees to be retained by Clerks for their own use. **59.** (1) Every Division Court Clerk shall be entitled to retain to his own use in each year all the fees and emoluments earned by him in that year up to \$1,000;

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- (2) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$1,000, and not exceeding \$1,500, he shall be entitled to retain to his own use 90 per cent., and no more;
- (3) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$1,500, and not exceeding \$2,000, he shall be entitled to retain to his own use 80 per cent., and no more;
- (4) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$2,000, and not exceeding \$2,500, he shall be entitled to retain to his own use 70 per cent., and no more;
- (5) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$2,500, and not exceeding \$3,000, he shall be entitled to retain to his own use 60 per cent., and no more;
- (6) Of the further fees and emoluments earned by every Division Court Clerk in each year in excess of \$3,000, he shall be entitled to retain to his own use 50 per cent., and no more. 43 V. c. 8, s. 39.

Fees and emoluments earned.—The clerk is entitled to \$1,000 for Sections "his own use." This may mean net or gross earnings, and the question is whether it is intended that the clerk should first deduct from his gross receipts such necessary disbursements of his office as rent, fire, light, cost of office books, etc., or make his return on gross receipts? The Government has taken the latter view, but whether it is correct or not is an open question. The following cases are referred to on the subject: McCargar v. McKinnon, 15 Gr., 361; Lawless v. Sullivan, 6 App. Cas. 373; Ashworth v. Outram, 5 Ch. D. 923; Lovell v. Newton, 4 C. P. D. 7; Workman v. Robb, 7 A. R. 389; Mersey Docks Board v. Lucas, 8 App. Cas. 891; Stroud, 379.

Besides the above, the following provisions are contained in "An Act respecting the fees of certain Public Officers," 55 V. c 17:-

- (2) Subject to the provisions of The Division Courts Act as to payments on gross incomes to the Provincial Treasurer, and to section 1 of this Act every Division Court clerk shall be entitled to retain to his own use in each year his net income up to \$1,500.
- (3) Of the further net income of each year he shall pay to the Provincial Treasurer for the purposes hereinafter mentioned, the following percentages on the net income over \$1,500, viz.:
- (a) On the excess over \$1,500, not exceeding \$2,000, ten per cent. thereof.
- (b) On the excess over \$2,000, not exceeding \$2,500, twenty per cent. thereof.
- (c) On the excess over \$2,500, not exceeding \$3,000, thirty per cent. thereof.
 - (d) On the excess over \$3,000, forty per cent. thereof.

The words "net income" are defined to mean, "the excess of all fees and emoluments, including receipts in the current year, whether on account of earnings and salary of such year, or of any former year or years after this Act goes into effect, by an officer by virtue of all his offices after deducting the disbursements incident to the business of the office or offices held by him: section 1.

60. On the 15th day of January in every year every Clerk to Division Court Clerk shall transmit to the Treasurer of pay excess the Province a duplicate of the return required by section error of Province. 68 of this Act, and shall also pay to such Treasurer for the use of the Province such proportion of the fees and emoluments earned by him during the preceding year, as under this Act he is not entitled to retain to his own use. 43 V. c. 8, s. 40.

A literal compliance with this section would seem to require that the return should be mailed on the 15th day of January in each year (see Beaty v. Fowler, 10 U. C. R. 382), and neither before nor after that day. The necessity for promptness in making this return, and the payment to the Provincial Treasurer of the amount, if any payable, cannot be too strongly urged upon clerks throughout the Province.

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INSPECTOR.

Appointment of inspector. 61. The Lieutenant-Governor may, from time to time, appoint an inspector of Division Courts, who shall hold office during pleasure, and whose duty shall be:

Inspection of offices.

1. To make a personal inspection of every Division Court and of the books and court papers belonging thereto;

Books, etc.

2. To see that the proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times, and in a proper form and order, and that the court papers and documents are properly classified and preserved;

Officers duties. 3. To ascertain that the duties of the officers of the Division Courts are duly and efficiently performed, and that the office is at all times duly attended to by the clerk;

Lawful fees.

4. To see that lawful fees only are taxed or allowed as costs;

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Security by clerks and bailiffs. 5. When directed so to do by the Lieutenant-Governor, to ascertain that proper security has been given by any clerk or bailiff, and that the sureties continue sufficient;

Report to the Lieutenant-Governor.

6. To report upon all such matters as expeditiously as may be to the Lieutenant-Governor for his information and decision. 43 V. c. 8, s. 23.

Proper Books.—These are the procedure book, cash book, debt attachment book (Rule 77) and the book of fees, charges and emoluments under section 68 of this Act.

At all times.—This means at all reasonable hours. It is suggested that registrar's hours, from 10 o'clock in the forenoon until four o'clock in the afternoon, would be reasonable. The office should be open every day, except Sundays and legal holidays, for the transaction of business.

Lawful fees.—The tariff and this statute prescribe all lawful fees. See notes to section 53.

Proper security.—See notes to section 35.

Power of Inspector in making inquiry into conduct of officers. 62. When the inspector considers it expedient to institute an inquiry into the conduct of a Division Court clerk or bailiff in relation to his or their official duties or acts, it shall be lawful for the inspector to require the clerk or bailiff, or other person or persons, to give evidence

on oath, and for this purpose the inspector shall have the sections same power to summon such officers, or other person or persons, to attend as witnesses, to enforce their attendance, and to compel them to produce documents, and to give evidence, as any Court has in civil cases. 43 V. c. 8, s. 24; 48 V. c 14, s. 13.

A very wide discretion is here given to the inspector. It should be carefully exercised, and only after he is satisfied that in the public interests an investigation is necessary. No preliminary requirement is necessary before the inspector makes this inquiry. It must necessarily be after the officer has at least some general knowledge of what he is charged with having done or omitted to do, and he should have a fair opportunity of explaining his conduct or answering the charges by his own evidence or otherwise.

The inquiry should not, it is submitted, be ex parte: see notes to sections 277, 279. Whenever the inspector may deem it "expedient," the enquiry can be made by him, and all parties can be summoned to give evidence before him.

An "inquiry" is not limited to what a man can see with his own eyes; it signifies a judicial inquiry with witnesses: Wenlock v. River Dee Co., 19 Q. B. D. 155.

Duties or acts.-The "inquiry" could only extend to the officer's "official duties or acts," and not to his private conduct, except in so far as the same might injuriously affect his official position.

Summon such officers.—As to summoning persons to give evidence and the consequences of disobeying a subpœna, see Wilson's Jud. Acts, 314-316. The inspector has power not only to summon the clerk or bailiff, but any "other person or persons." Should the officer desire any person summoned in his interests, it should be done, for the inquiry should be full and complete on both sides. The inspector would have to draw up and serve a summons, answering the place of a subpæna in ordinary cases and have the same served on the persons required to attend. If "books and documents" were required to be produced a duces tecum clause would have to be inserted in the summons to the witness. See notes to sections 131-134. It is suggested that the inspector should take proper notes of the evidence taken by him to be reported to Government.

63. The Division Court clerks and bailiffs shall, as Books, etc., often as required by the inspector, produce all books and produced documents required to be kept by them, or that may here-tion. after be required to be kept by them, at the clerk's office, for examination and inspection: every clerk or bailiff shall report to the inspector such matters relating to any cause or proceeding as the inspector shall require. 43 V. c. 8, s. 26.

The inspector is entitled as of right, to see all books and documents required to be kept by clerks and bailiffs. The refusal or neglect to produce such books and documents might prove a serious matter to any clerk or bailiff required to do so by the inspector. The fullest information

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should, therefore, be given by the officers, and due production of "all books and documents," made to the inspector by them.

Officers to inform inspector of their appointment, etc.

64. It shall be the duty of every Division Court clerk or bailiff, within five days after his appointment to office, to inform the inspector of his appointment, his full name and post office address, the names of his sureties, their respective callings or professions, places of residence, and post office address. 43 V. c. 8, s. 27.

Within five days.—The time would commence to run from the day that the officer was notified of his appointment, either by receipt of his commission or by seeing it in the Ontario Gazette, or so advised by the Provincial Secretary. The day on which he became aware of his appointment would not be included in the "five days." The clerk could not perform any official act until he had put in his security: See notes to section 36.

Full name.—The full name must be given. For instance, "C. A. Smith" would not be a compliance with the Act, if the name were "Charles Alexander Smith."

Names of his sureties.—It might be well to give the full names of the sureties also, though not required by the section.

Callings or professions.—The calling or profession should be given according to the fact. The post-office address means the P. O. at which a person usually gets his letters and papers. As to what is a man's residence see notes to section 81.

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Inspector sureties,

65. When a clerk or bailiff has given new sureties, as formed of required by this Act, he shall immediately inform the inspector of such change, giving the names of the sureties, their respective callings or professions, places of residence, and post office address. 43 V. c. 8, s. 28.

> New sureties: - See sections 40 and 41 and notes. Immediately.—See notes to section 20. Post-office address.—See notes to section 64.

Officers to produce certificate of filing covenant, etc.

66. Every Division Court clerk and bailiff shall have and keep in his possession or custody the certificate of the Clerk of the Peace named in section 36 of this Act, and shall produce the same for the information of the inspector when required so to do. 43 V. c. 8, s. 29.

This requirement is imperative. Each clerk should keep the certificate in such a place that he may be able to produce it readily to the inspector whenever required. It is the duty of the Clerk of the Peace to give this certificate: See notes to section 36.

The inspector need not make his request in writing. A vertal request would be sufficient.

67. Every clerk shall, on or before the 15th day of sections January in each year, make a return of the business of his Returns. office for the year ending 31st day of December preceding, in such form and manner as the Lieutenant-Governor shall direct. 43 V. c. 8, s. 30.

Make a return.—This is imperative. The return should be mailed to the Provincial Secretary, at Toronto, not later than the 15th January in each year. The mailing of it, postage prepaid, would be a compliance with the Act.

68. Every clerk and bailiff shall keep a separate Clerks to make rebook in which he shall enter from day to day all fees, turns to inspector, charges and emoluments received by him by virtue of office, and shall on the 15th day of January, in every year, make up to and including the 31st day of December of the previous year, a return to the Inspector, under oath showing the aggregate amount of fees, charges and emoluments so received by him and which he has become entitled to receive, and has not received during the year. 43 V. c. 8, s. 31.

Shall keep .- This is also imperative. The section applies to the bailiff as well as to the clerk. The book here required should be kept closely written up. The entry of the total amount of costs in each suit when received by the officer, it is thought, would be a sufficient compliance with the section. The entries are to be made from day to day as the fees, etc., are received by the officer. The fees earned but not received need not be entered, although they must be included in the return to the inspector.

Return to the inspector. - See notes to section 67. This is the return to the inspector, that required by section 67, is to be made to the Lieutenant-Governor.

Make oath. - The oath may be taken by any of the persons mentioned in section 143: R. S. O. c. 61, s. 34.

JURISDICTION.

69. The Division Courts shall not have jurisdiction in Cases in which any of the following cases: Court has no juris-diction.

1. Actions for any gambling debt;

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2. Actions for spirituous or malt liquors drunk in a tavern or alehouse:

3. Actions on notes of hand given wholly or partly in consideration of a gambling debt or for such liquors;

- 4. Actions for the recovery of land or actions in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question;
- 5. Actions in which the validity of any devise, bequest or limitation under any will or settlement is disputed;
- 6. Actions for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage;
- 7. Actions against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto. R. S. O. 1877, c. 47, s. 53.

Jurisdiction of the Court.—The Division Courts are from their nature courts of limited jurisdiction. They are the creatures of the statute; and to the Act of Parliament to which they owe their existence, and from which they derive their powers, must we look for their jurisdiction over persons and matters. They possess no common law authority, as the Courts of the Sovereign, but on the contrary, their authority is defined and restricted in their creation. Judges of these courts, and the officers executing their process, cannot exceed the statutory jurisdiction with impunity. A Judge may be entirely erroneous in his opinion of law on a question within his jurisdiction, and there is an entire immunity from consequences at the suit of the injured party; but the very moment he transgresses that boundary which the Legislature has thought proper to place on his power, then he is liable for any wrong committed, in the same way as any other individual, if he knew or had the means of knowing the want of jurisdiction. "The jurisdiction which he exercises is a jurisdiction conferred and limited by statute, and if the conditions precedent to its exercise do not exist, the whole proceeding in the Court is co am non judice;" per Lush J., in Serjeant v. Dale, 2 Q. B. D., at page 566; Calder v. Halket, 3 Moo. P. C. 28; Carratt v. Morley, 1 Q. B. 18; Houlden v. Smith, 14 Q. B. 841; and Graham v. Smart. 18 U. C. R. 482 The omission of a duty cast upon the Judge renders him liable at the suit of a person injured: Parks v. Davis, 10 C. P. 229. The law makes no presumption in favour of inferior jurisdictions, but it will intend nothing against them: Christie v. Unwin, 11 A. & E. 379, per Coleridge, J.; and In re Clarke, 2 Q. B. 630, per Lord Denman; Bullen v. Moodie, 13 C. P., at page 138, per Draper, C.J. And as a general rule every circumstance required by the statute to give jurisdiction must appear on the face of the proceedings or by reasonable intendment: R. v. All Saints, Southampton, 7 B. & C. 790, per Holroyd, J.; Gosset v. Howard, 10 Q. B. 411; R. v. Helling, 1 Strange, 8; and R. v. Totness, 11 Q. B. 60. Should a Division Court assume jurisdiction where it has none, the remedy is prohibition. Should the judge refuse to consider or adjudicate on a matter within his jurisdiction, the remedy is mandamus.

Where a justice of the peace has jurisdiction to entertain a claim for wages, has done so, and adjudicated upon such and dismissed it, the claim cannot then be sued in the Division Court: Millet v. Coleman, Dawson v. Coleman, 33 L. T. N. S. 204.

Where a rule of a Building Society is that all disputes by members against the Society shall be settled by arbitration, it was held that the right to bring an action was taken away: Ex parte Payne, 5 D. & L. 679.

The jurisdiction of the Division Court is not ousted by the pendency of another action for the same cause in a Superior Court: McMurray v. Wright, 11 W. R. 34; Bissell v. Williamson, 7 H. & N. 391.

Section 69

It is said that the Division Court can try cases of detinue: Taylor v. Addyman, 13 C. B. 309. Money may probably be paid into court in that form of action: *Idem*; see also section 125.

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he 79. If the Judge has no jurisdiction, he can neither amend, nor adjourn, nor do anything else: he is coram non judice: per Maule, J., Taylor v. Addyman, 13 C. B. 316; see also "Prohibition," post.

A defendant does not admit the jurisdiction by appearing to object to the jurisdiction of the court: Fearon v. Norvall, 5 D. & L. 439; per Ld. Selborne; Hamlyn v. Betteley, 6 Q. B. D. 65.

It was held that the Division Courts Act, 1880, did not apply to the territorial divisions and unorganized tracts of the Province: In re Ontario Bank v. Harston, 9 P. R. 47; see In re Drinkwater v. Clarridge, 8 P. R. 504.

It is doubtful if an action of trover for a deed is within the jurisdiction of a Division Court: Ginn v. Scott, 11 U. C. R. 542.

A witness in a Division Court suit, having admitted that he was the real debtor, it was held that the Judge had power, under D. C. Rule 115, to allow him to be substituted for the defendant: In re Henney v. Scott, 8 P. R. 251.

A Division Court has jurisdiction to entertain an action upon a judgment of a Superior Court: Re Ebberts v. Brooks, 11 P. R. 296; reversing the decision of that case as reported in 10 P. R. 257.

In England judgments of the County Court there (somewhat analogous to our Division Court judgments) do not bear interest: R. v. The County Court Judge of Essex, 18 Q. B. D. 704. Interest is only recoverable there on execution from these courts, but we think that by virtue of the 7th section of this Act, interest is recoverable on the judgment of a Division Court from the time of its becoming so.

Prohibition.—"All lawful jurisdiction is derived from and must be traced to royal authority. Any exercise, however fitting it may appear of jurisdiction not so authorized, is an usurpation of the prerogative and a resort to force unwarranted by law. Upon both grounds, namely, the infringement of the prerogative and the unauthorized proceeding against the individual, prohibitions by law are to be granted, at any time, to restrain a court, to intermeddle with, or execute anything which by law they ought not to hold plea of; and they are much mistaken that maintain the contrary: "per Willes, J., London (Mayor) v. Cox, L. R. 2 H. L.254, citing Articuli Cleri, 3 Jac. 1; Answer to 3rd objection, 2 Inst. 602; see Jordan v. Marr, 4 U. C. R. 53.

An order for prohibition cannot be granted against a tribunal on which the law confers no power of pronouncing a judgment or an order imposing a legal duty or obligation upon an individual: Godson v. City of Toronto. 16 A. R. 452; 18 S. C. R. 36; Ex parte Death, 18 Q. B. 647; Chabot v. Morpeth, 15 Q. B. 446, 459; R. v. Local Government Board, 10 Q. B. D. 321; Re Bell Telephone Co. and Minister of Agriculture, 7 O. R. 605; Ex parte Kingstown Commissioners, 18 L. R. 17. 509. See however, Re Pacquette, 11 P. R. 463; Re Young, 14 P. R. 808.

There are five classes of cases in which prohibition may be applied for: -

1. Where the court has no jurisdiction over the cause and the want of jurisdiction appears on the face of the proceeding.

2. Where the defect does not appear on the face of the proceeding.

- 3. Where there is jurisdiction over the subject matter, but no power to try a particular issue.
- 4. Where there is jurisdiction over the subject matter, but the court acts in such a manner as to be a denial or perversion of right.
 - 5. Where the Judge is interested.

Where the defect is apparent.—Prohibition may be granted at any time either before or after judgment: London (Mayor) v. Cox, L. R. 2, H. L. 239; Roberts v. Humby, 3 M. & W. 120; Nerlich v. Clifford, 6 P. R. 212; Summerfeldt v. Worts, 12 O. R. 48; Re Judge of Northumberland, 19 C. P. 299; Wright v. Arnold, 6 Man. L. R. 1; Bank of Montreal v. Poyncr, 7 Man. L. R. 270; 1 West. L. T. 205.

It is much better for the party to apply in the first stage, than after expenses are incurred: Francis v. Steward, 5 Q. B. 994. But not after the money recovered has been paid over, as no further step remaining to be considered, there would be nothing to prohibit: Kempton v. Willey, 9 C. B. 719; Denton v. Marshall, 1 H. & C. 654.

If a defect of jurisdiction is distinctly brought to the notice of the Judge it is the same as if appearing on the face of the proceedings: Per Pollock, C. B. 1 H. & C. 659. See Sherwood v. Cline, 17 O. R. at p. 39.

A total want of jurisdiction cannot be cured by assent of parties: Jones v. Owen, 5 D. & L. 669; De Habar v. Queen of Portugal, 17 Q. B. 213, 214; Knowles v. Holden, 24 L. J. Ex. 223.

Where the plaintiff had recovered judgment in an inferior court, which had no jurisdiction, it was held he was entitled to judgment in a court having jurisdiction, though no prohibition against enforcing the first judgment had been obtained: Briscoe v. Stephens, 2 Bing. 213.

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Where the defect is apparent the grant or refusal of the writ is not in the mere discretion of the court, but the court is bound to issue the writ of Ex debito justitiæ; London (Mayor) v. Cox, L. R. 2 H. L. at p. 279; Buggin v. Bennett, 4 Burr. 2035; Bodenham v. Ricketts, 6 N. & M. 537.

Where the defect is not apparent.—In Broad v. Perkins, 21 Q. B. D. 533, the Court of Appeal adopted the following proposition from London (Mayor) v. Cox, 283: "Where, however, the defect is not apparent, and depends upon some fact in the knowledge of the applicant, which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the court would decline to interpose except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant."

Where the objection is that the suit was brought in the wrong Division Court, objection must be made by notice under section 176, and an application must be made to change the place of trial under section 37, as amended by 52 V. c. 12, s. 5, otherwise an application for prohibition before trial will not be sus ained: Watson v. Wolverton, 9 C. L. T. 480; but the fact that the defendant does not apply for a transfer previously to the trial (or perhaps not at all) does not oust the right to prohibition, if the Court proceeds with the trial without jurisdiction: Re Thompson v. Hay, Q. B Div. Ct. 29th Nov., 1892. If the defendant takes any step in the suit before raising the question of territorial jurisdiction, he waives his right to prohibition: Re Jones v. James, 19 L. J. Q. B. 257; Moore v. Gamgee, 25 Q. B. D. 244.

The motion in these cases is generally made after judgment, as the proceedings in Division Courts rarely show any excess in jurisdiction, the excess may depend only upon the defence set up orally by the defendant, and may appear only in the course of the trial, and judgment may follow almost as soon as the defence is understood. Under such circumstances there would be no opportunity of moving for a prohibition before judgment, and, unless the motion was allowed after judgment, the excess of jurisdiction would be without redress: Marsden v. Wardle, 3 E. & B. 695; Heyworth v. London, 1 C. & E. 312.

The application must be made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right: London (Mayor) v. Cox, 279; Bank of Montreal v. Poyner, 11 C. L. T. 84.

Material delay will be a bar to the writ: Denton v. Marshall, 1 H. & C. 654. A delay of two months was held to be a bar: Re Smart and O'Reilly, 7 P. R. 364.

Where the defendant applied for a new trial, which was granted on payment of costs, which were not paid, and the defendant applied after the day appointed for payment, for prohibition, the writ was refused: Robertson v. Cornwell, 7 P. R. 297.

Where the applicant had cross-examined witnesses, argued the case, and taken no exception to jurisdiction, prohibition was refused: In re Burrowes, 18 C. P. 493.

Where the defendant disputed the jurisdiction, but did not attend at the trial, and evidence was given sufficient *prima facie* to shew jurisdiction, and a motion for prohibition was made three weeks after the trial, the writ was refused: Friendly v. Needler, 10 P. R. 267, 427.

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Where an erroneous order was made at the request of the applicant and was acted upon, prohibition was refused: Richardson v. Shaw, 6 P. R. 296.

As to how far admitting jurisdiction waives prohibition, see In re Cleghorn v. Munn, 2 L. J. N. S. 133. Where the applicant did not shew that all the materials in which the order issued were before the court, prohibition was refused: Re Grass and Allen, 26 U. C. R. 123.

Where cause was referred by consent, without objection to jurisdiction, but during progress of the reference title to land came into question, and one of the parties objected, prohibition was held to lie: Knowles v. Holden, 24 L. J. Ex. 223.

Where a party takes a benefit under a Judge's order, he cannot afterwards object that it was made without jurisdiction: Tinkler v. Hilder, 4 Ex. 187; Buffalo and Lake Huron Ry. Co. v. Hemmingway, 22 U. C. R. 562; Harrison v. Wright, 13 M. & W. 816.

Where a defendant sought prohibition upon the ground that his co-defendant resided out of Ontario, but had not urged the objection in the Division Court, and had been guilty of delay, prohibition was refused: Re Soules v. Little, 12 P. R. 533.

Where defendants were resident out of the jurisdiction, but appeared at the trial, and after their objection to jurisdiction was overruled, proceeded with the defence and cross-examined the witnesses, prohibition was refused: Re Guy v. G. T. R. Co. 10 P. R. 372. And where they moved to set aside the judgment, and to be let in to defend, they were held to have acquiesced in the jurisdiction: Gibbons v. Chadwick, 12 C. L. T. 207.

Where a third party had not been served with process, but applied at the trial and took part in the proceedings, prohibition was refused: Re Merchants' Bank v. Van Allen, 10 P. R. 348.

Where the defendant did not negative the existence of such facts as would give a Judge of the Division Court jurisdiction to make an order for substitutional service, prohibition was refused: Re Hibbitt v. Schilbroth, 18 O. R. 399.

A party does not lose his right to prohibition by obtaining from the Judge a statement of the case for the opinion of a Superior Court: Jackson v. Beaumont, 11 Ex. 300.

An appeal does not necessarily prevent prohibition: Veley v. Burder, 12 A. & E. 313, 314; White v. Steel, 12 C. B. N. S. 410; Harrington v. Ramsay, 8 Ex. 879; but in Comyn's Digest, Title Prohibition (D), it is said, "but generally after an appeal a prohibition should not be allowed if the matter be not apparent, for by that the party affirms the jurisdiction." But while an appeal is pending, prohibition will be refused: Wiltsie v. Ward, 9 P. R. 216. See also Devonshire v. Foote, Ir. R. 7 Eq. 365. See also as to acquiescence in jurisdiction, Yates v. Palmer, 6 D. & L. 288; Winsor v. Dunford, 12 Q. B. 603; Ex parte Cowan, 3 B. & A. 123; Bank of Ottawa v. Wade, 11 C. L. T. 339; 12 C. L. T. 72; 21 O. R. 486.

Particular Issue.—Exception must first be taken in the court below. The prohibition acts simply in aid of the special or inferior court, by trying what that court had no jurisdiction to try, and upon an affirmative decision, the prohibition is absolute; but upon a negative decision, there is a judgment of consultation, upon which the special or inferior court proceeds with the cause, unhampered by the objection: London (Mayor) v. Cox, 276.

Where a breach of contract was not within the jurisdiction, prohibition was granted as to that part of the cause of action, leaving it open to the plaintiff to proceed on amended particulars for a breach of the contract which was within the jurisdiction: Walsh v. Ionides, 1 E. & B. 383. See R. v. Judge of Westmoreland County Ct., 58 L. T. N. S. 417.

Prohibition was granted to restrain an action for the recovery of land so far as freehold, but not so far as leasehold: Kerkin v. Kerkin, 3 E. & B. 399.

A Judge struck out a count which ousted his jurisdiction. Held, that he had power to do so, and that if a prohibition had been applied for before trial it would only have been granted as far as that count: Fitz-simmons v. McIntyre, 5 P. R. 119. See also Meek v. Scobell, 4 O. R. 553; Hallack v. Cambridge, 1 Q. B. 593; R. v. Twiss, L. R. 4 Q. B. 407.

Denial or Perversion of Right. — Such, for instance, as a refusal of a copy of the libel, in which case the prohibition is only quousque, or refusal of a valid plea to a subject matter of complaint within the jurisdiction, in which case althoug's, if the plea had been received, it might have been tried in the court below, yet, if it be refused, upon its validity and truth being established in the court above, the prohibition is absolute: London (Mayor) v. Cox, 276; re Elliott v. Biette, 21 O. R. 595; Re Trimble v. Miller, 12 C. L. T. 415.

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If the defendant was served, the day before any sittings, with an ordinary summons, should the Judge insist on proceeding with the hearing at such sittings, prohibition would lie: Ex parte McFee, 9 Ex. 261; Ex parte Story, 12 C. B. 767; James v. The S. W. Ry. Co., L. R. 7 Ex. 287; Serjeant v. Dale, 2 Q. B. D. 566; Zaritz v. Mann, 16 L. J., N. S. 144.

Where a Judge directed the jury to find for the plaintiff, the evidence being uncontradicted, it was held, that he had exceeded his jurisdiction and assumed the functions of the jury, and prohibition was granted; Re Lewis v. Old, 17 O. R. 610.

Where a Judge granted a new trial, after the expiration of 14 days, contrary to section 145, prohibition was granted: Re Foley v. Moran, 11 P. R. 316; Bland v. Rivers, 19 O. R. 407; but quære, whether application should not first be made to the Judge of inferior court to set aside the order for new trial, as irregular: Jones' Trustees v. Gittins, 51 L. T. N. S. 599.

Where a notice in writing is a condition precedent to the continuance of the action, a court has no jurisdiction to proceed in the absence of the notice: Re McGregor v. Norton, 13 P. R. 223; R. v. Arkwright, 12 Q. B. 960; and an insufficient notice cannot be amended: Re Coe v. Coe, 21 O. R. 409. It is difficult to draw a sharp line between excess of jurisdiction and an improper exercise of it, and where the court has a discretion, prohibition will be refused: Jackson v. Copland, 8 T. L. R. 259.

Amendment to give jurisdiction.—If a plaint be beyond the jurisdiction of the inferior court, the court has no power to amend so as to bring it within the jurisdiction: Jordan v. Marr, 4 U. C. R. 53; Powley v. Whitehead, 16 U. C. R. 589 (title to land); Ferguson v. Corp. of Howick, 25 U. C. R. 555 (suit in wrong County Court); Hodgson v. Graham, 26 U. C. R. 127 (excessive claim); Young v. Morden, 10 P. R. 276 (excessive claim); Insley v. Jones, 4 Ex. D. 16 (refusal to send to County Court when claim £50 "and interest"); Hopper v. Warburton, 7 L. T. N. S. 722 (malicious prosecution-no power to change to false imprisonment); Avards v. Rhodes, 8 Ex. 312; 17 Jur. 71 (unadmitted set-off); Lawford v. Partridge, 1 H. & N. 621; 3 Jur. N. S. 271 (title to land); Sherwood v. Cline, 17 O. R. 30 (ascertainment of disputed account); Re Hill, 10 Ex. 726 (amendment reducing claim within jurisdiction); In Greenizen v. Burns, 13 A. R. 481, the claim in County Court action was \$400 "and interest." Upon appeal from a verdict for plaintiff, it was held, that the County Court had power to strike out the words "and interest." The court referred to Thomas v. Hilmer, 4 U. C. R. 527, in which the verdict was for an amount beyond, but the claim was within, the jurisdiction. "It seems to me that a claim on the record beyond the jurisdiction is more serious than an assessment for the same amount:" Per Rose, J. Sherwood v. Cline, 17 O. R. 37. But where the plaintiff seeks to abandon the excess over the jurisdiction, the court has jurisdiction to permit the amendment: Re White v. Galbraith. 12 P. R. 513; and if the amendment be not made, prohibition will be granted only as to the excess: Elliott v. Biette, 21 O. R. 595; Re Trimble v. Miller, 12 C. L. T. 415.

Where Judge interested.—Where a Judge of an inferior court proceeds to try, by himself, or his deputy, a cause in which he is himself interested, he will be restrained by prohibition: Bac. Abr. Prohib. (16), Hutton v. Fowke, 1 Reb. 648; Anon. 1 Salk. 396, but there would seem to be no objection to an uninterested Deputy Judge hearing the cause: Exparts Medwin, 1 E. & B. 609; 17 Jur. 1178. The fact that the plaintiff is the Judge's servant disqualifies him: Gallant v. Young, 11 C. L. T. 217.

Upon the subject of interest of persons occupying judicial or quasi judicial positions the following authorities may be referred to:—R. v. Collins, 2 Q. B. D. 30, 35; Lush's Pract. 195; Bennett v. Brumfit, L. R. 3 C. P. 28; Re Muskoka and Gravenhurst, 6 O. R. 352; R. v. Milledge, 4 Q. B. D. 332; Hill v. Managers of Met. Asylum District, 4 Q. B. D. 433; R. v. Bishop of Oxford, 4 Q. B. D. 245, 525; 5 App. Cas. 214; R. v. Handsley, 8 Q. B. D. 383; R. v. Lee, 9 Q. B. D. 394; Re Vashon v. East Hawkesbury, 30 C. P. 194, 203; Borough of Freeport v. Marks, 59 Penn. 253-257; Strekert v. East Saginaw, 22 Mich. 104-112; Baird v. Almonte, 41 U. C. R. 415; Cannon v. Torouto Corn Exchange, 5 A. R. 268; Paley on Convictions, 6th ed., 40-48; Randall v. Brigham, 7 Wallace, 523; Bradley v. Fisher, 13 Wallace, 335; Bingham,

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Cabbot, 3 Dallas, 19; U. S. v. Lancaster, 5 Wheaton, 484; Slocum v. Sims, 5 Cranch, 363; Life & Fire Insurance Co. v. Wilson, 8 Peters, 291; Cooley on Torts, chap. 14; Willis v. MacLachlan, 1 Ex. D. 376; Lowter v. Radnor (Earl of), '8 East, 113-118; Frey v. Blackburn, 3 B. & S. 576; Pappa v. Rose, L. R. 7, C. P. 525; Tharsis Sulphur Co. v. Loftus, L. R. 8 C. P. 1; Stevenson v. Watson, 4 C. P. D. 148; R. v. Langford, 15 O. R. 52; R. v. Chapman, 1 O. R. 582; R. v. Klemp, 10 O. R. 143; Conmee v. C. P. R. Co., 16 O. R. 639; R. v. Farrant, 20 Q. B. D. 58; R. v. Eli, 10

O. R. 727; R. v. Richardson, 20 O. R. 514.

Prohibition will not be granted in any of the following cases: Where the facts relied upon as ousting jurisdiction are not extrinsic to the adjudication which is impeached: Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417. Where the subject of the suit is within the jurisdiction, though matter is started beyond the jurisdiction, unless court is proceeding to try such matter: Dutens v. Robson, 1 H. Bl. 100. Where the matter is immaterial: Butterworth v. Walker, 3 Burr. 1689. For mistake of law: Toft v. Rayner, 5 C. B. 162; Lexden v. Southgate, 10 Ex. 201; Ellis v. Watt, 8 C. B. 614; Re Grass v. Allan, 26 U. C. R. 123; Norris v. Carrington, 16 C. B. N. S. 396; Meredith v. Whithingham, 1 C. B N. S. 216, or for a mere irregularity in the proceedings: London (Mayor) v. Cox, L. R. 2 H. C. 276; Dougall v. Legge, 1 West. L. T. 246. Where the judgment is unwise or unjust: Zohrab v. Smith, 5 D. & L. 639. Upon a mere matter of practice: Foster v. Temple, 5 D. & L. 655; Carter v. Smith, 4 E. & B. 696; McLean v. McLeod, 5 P. R. 467; Fee v. McIlhargey, 9 P. R. 329; McKay v. Palmer, 12 P. R. 219; Backhouse v. Bright, 13 P. R. 117. Where it is doubtful if the jurisdiction extends to a place where an alleged offence was committed: Re Birch, 15 C. B. 743. Where the judgment is against law and good conscience: Siddall v. Gibson, 17 U. C. R. 98. For improper reception or rejection of evidence: Winsor v. Dunford, 12 Q. B. 603. Where an order of committal is made against a judgment debtor who claimed to be a discharged insolvent: Still v. Booth, 1 L. M. & P. 440; 15 Jur. 577. That a bailiff has seized too much property: Ex parte Summers, 2 C. L. R. 1284; 18 Jur. 522; where in an action for false imprisonment (within the jurisdiction) the judge has, in estimating damages, considered matters the subject of malicious prosecution (beyond the jurisdiction): Chivers v. Savage, 5 E. & B. 697; where a court erroneously held that a debt was attachable: Bland v. Andrews, 45 U. C. R. 431: see Macfie v. Hutchinson, 12 P. R. 167; or that a debt was due: Field v. Rice, 20 O. R. 309; or misinterpreted a statute not going to the limits of jurisdiction: Long Point Co. v. Anderson, 18 A. R. 401; where the Judge refused application for new trial, but afterwards granted a new trial for misconduct of jury without evidence to warrant such finding: Moxon v. London Tramways Co., 60 L. T. N. S. 248, sub nom, R. v. Judge of Greenwich Co. Ct.; that the plaintiff had no existence in fact or law and no title to sue: Western Fair Association v. Hutchinson, 12 P. R. 40. "The misinterpretation of either the common or statute law is a proceeding confessedly within the jurisdiction of these (inferior) courts, and where they are bound to exercise their judgment upon the one or the other seems to be rather a matter of error to be reversed upon appeal (if any) than a ground for prohibition:" Home v. Camden, 2 H. Bl. 536.

Where the jurisdiction depends upon contested facts.-The first question is, whether the inferior court had jurisdiction to enter upon the inquiry: Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417

The inferior court has such jurisdiction when the action is prima facie within its jurisdiction, e.g.—an action of trespass to goods: Long Point Co. v. Anderson, 18 A. R. 401; or for balance of an account settled by a part payment in goods, although defendant denies that goods delivered in

payment: Joseph v. Henry, 1 L. M. & P. 388: 15 Jur. 104: or for conversion of a chattel: Bushell v. Moss, 11 P. R. 252; or for rent: Crawford v. Seney, 17 O. R. 74; and in such a case prohibition will not be granted until the Judge has inquired into the facts, to ascertain if the action is within the jurisdiction: Dixon v. Snarr, 6 P. R. 386.

Nothing can be inferred to cust jurisdiction where in any aspect of the case there is jurisdiction: English v. Mulholland, 9 P. R. 145. See Stephens v. Laplante, 8 P. R. 52, where the Judge had not decided question on which jurisdiction depended, and prohibition was granted; Jenkins v. Miller, 10 P. R. 95; Re Thompson v. Hay, 22 O. R. 588, where the Judge had decided that the parties had agreed to a set-off, and prohibition was refused, see also Fleming v. Livingston, 6 P. R. 63.

If the Judge finds the facts to be such as do not oust the jurisdiction, his finding is conclusive, and will not be reversed except upon strong grounds: per Cockburn, C. J., Elston v. Rose, L. R. 4 Q. B. 4; Brown v. Cocking, L. R. 3 Q. B. 672; but see Liverpool Gas Light Co. v. Overseers of Everton, L. R. 6 C. P. 414.

When the finding of fact shows jurisdiction, any wrong construction, either of an Act of Parliament or document, will not be ground for prohibition. "Within his jurisdiction he may misconstrue a statute or document, or otherwise misdecide the law as freely and with as high an immunity from correction, except upon appeal, as any other Judge:" per Osler, J.A. 18 A. R. 408; see Siddall v. Gibson, 17 U. C. R. 98; Enraght v. Penzance, 7 App. Cas. 240; Chisholm v. Oakville, 12 A. R. 225: Re Bowen, 15 Jur. 1196; see also Sims v. Kelly, 20 O. R. 291, decided before the appeal in Long Point Co. v. Anderson, and which is perhaps not law.

But, if upon the facts, as proved, or upon admitted facts, or upon the proper construction of an Act or document, the Judge has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition: see Elston v. Rose, L. R. 4 Q. B. 4, where the Judge had jurisdiction over premises of a certain value and wrongly decided that the value was to be ascertained in a manner not authorized by the statute giving jurisdiction: per Blackburn, J., "He applied a wrong rule of law to the facts:" see also Evans v. Sutton, 8 P. R. 367, where the Judge wrongfully construed an Act to authorize a judgment without evidence: R. v. Arkwright, 12 Q. B. 960; Re Coe v. Coe, 21 O. R. 409, where upon the true construction of a statute certain notices must have preceded the inquiry: Ahrens v. McGilligat, 23 C. P. 171, where the Judge wrongly applied an Act authorizing service upon a foreign railway corporation by serving a station master, to a case in which he had no jurisdiction: Moore v. Wallace, 13 P. R. 201, where a Judge exceeded his jurisdiction by contravening the provisions of a statute: R. v. Judge of County Court of Lincolnshire, 20 Q. B. D. 167, where Judge wrongly construed a will as giving a vested interest in funds to defendant, and appointed a receiver thereof: Liverpool Gas Co. v. Everton, L. R. 6 C. R. 414, where a Judge's decision, upon a question of mixed law and fact, was reviewed and prohibition granted. "A court of limited jurisdiction cannot give itself jurisdiction by finding any facts": per Lord Wensleydale, Rorke v. Errington, 7 H. L. C. 617 at p. 632; Jacomb v. Turner, (1892), 1 Q. B. 47.

And where on a point collateral to the merits of the case, upon the decision of which the limit of its jurisdiction depends, the inferior court has wrongly decided even upon the facts, the decision may be reviewed: London (Mayor) v. Cox, L. R. 2 H. L. 262, 288; Bunbury v. Fuller, 9 Ex. 111; Pease v. Chaytor, 3 B. & S. 620; Thompson v. Ingham,

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14 Q. B. 710, (where the inferior court wrongly decided that the title to land was not in question): R. v. Stimpson, 4 B. & S. 301; Chew v. Holroyd, 8 Ex. 249; Marsden v. Wardle, 3 E. & B. 695; Chisholm v. Oakville, 12 A. R. 225 at p. 230.

The court will look beyond the evidence in the court below and allow additional evidence to be given shewing jurisdiction: Heyworth v. London (Mayor), 1 C. & E. 312.

Application—By whom made.—The party against whom the plaint has been lodged generally makes the application. Where in a garnishment proceeding the court has no jurisdiction over the primary debtor, either the debtor or the garnishee may apply: DeHaber v. Portugal (Queen), 17 Q. B. 171; Wadsworth v. Spain (Queen), 17 Q. B. 191.

A stranger may make the application: Articuli Clari, 3 Jac. 1, 3rd objection; L. R. 2 H. L. 279; but the better opinion seems to be that the interference of the court, upon the application of a stranger is discretionary: L. R. 2 H. L. 280; Re Foster 4 B. & S. 187; Worthington v. Jeffries, L. R. 10 C. P. 379; Chambers v. Green, L. R. 20 Eq. 552; Ellis v. Fleming, 1 C. P. D. 237.

To whom made.—The application is made to a Judge of the High Court in Chambers: R. S. O. (1877), c. 52, s. 3; R. S. O. (1887), c. 44, s. 36; C. R. 1137; Watson v. Lillico, 6 Man. L. R. 59. It may be made to the Chancery Division: Re North Perth. Hessin v. Lloyd, 21 O. R. 538.

Material in support of.—The application must be supported by affidavits shewing the want of jurisdiction: C. R. 1137; all the materials upon which the court below has acted should be brought before the court: Re Grass v. Allen, 26 U. C. R. 123.

The affidavit should be entitled, "In the High Court of Justice." It is not necessary that any division should be mentioned in the title: Olmstead v. Errington, 11 P. R. 366. Each affidavit should, however, be marked with the name of some division: R. S. O. c. 44, s. 23. The absence of this may be amended: Olmstead v. Errington, 11 P. R. 366; C. R. 444; Robertson v. Coulton, 9 P. R. 16. The affidavits should not bel entitled in any cause: Ex parte Evans, 2 Dowl. N. S. 410; Siddall v. Gibson, 17 U. C. R. 98; Miron v. McCabe, 4 P. R. 171; but if the names of the plaintiff and defendant are used as if there were a cause, the names are mere surplusage: Hargreaves v. Hayes, 5 E. & B. 272; Breedon v. Capp, 9 Jur. 781; and in practice it is usual to style the affi-Division. In the matter of davits, "In the High Court of Justice a plaint in the Division Court in the, etc., wherein A. B. is plaintiff and C. D. defendant": Re Burrowes, 18 C. P. 493.

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It is for the party opposing prohibition to shew jurisdiction: R. v. Lord Mayor, 8 T. L. R. 298; but see Bongard v. McWhirtier, 12 U. C. R. 143; McWhirtier v. Bongard, 14 U. C. R. 84; Re Superintendent of Schools v. Sylvester, 18 U. C. R. 538, where it is laid down, that the party applying must make out a clear case.

Notice of Motion.—Unless the court or Judge gives special leave to the contrary, notice should be served two clear days before the return day of the motion, and in the computation of such two clear days, Sundays and days on which the offices are closed are not to be included: C. R. 479. The day of service and the return day are both excluded: C. R. 475. No summons, rule or order to shew cause will be granted: C. R. 526. The Judge of the inferior court and the parties opposed in interest to the party making the application, should be served with the notice. If the prohibition is to restrain a ministerial act such as the issue of a warrant of exe

cution or commitment, the clerk should be served with notice: Re Woltz Section v. Blakely, 11 P. R. 430; R. v. Fletcher, 2 E. & B. 279.

Rules of Court .- The following are the Consolidated Rules referring to prohibition:

1137. "It shall not be necessary to file a suggestion on any application for an order for prohibition. The application may be made on affidavit, subject to the general rules as to motions and evidence on motions.

1138. "No writ of prohibition shall issue in any case, but the order for prohibition shall have the same effect as a writ of prohibition formerly had.

1139. "Any such order may be discharged or varied or set aside by a Divisional Court, subject to an appeal to the Court of Appeal."

An appeal may also be made to the Supreme Court of Canada: 54-55 V. c. 25, s. 2 (D.)

Notice of appeal must be served on County Judge; Gibbons v. Chadwick, 12 C. L. T. 328.

Stay of Proceedings.-Proceedings in the court below cannot be stayed by the High Court pending prohibition: Miron v. McCabe, 4 P. R. 171. The inferior court might, however, by virtue of its inherent power, stay proceedings.

If execution has been levied and the money made, the prohibiting court will order its repayment: Re Johnson v. Therrien, 12 P. R. 442. And where a transcript had been issued to a higher court, the judgment founded thereon was set aside: Labatt v. Chisholm, 11 C. L. T. 188.

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Declaration in Prohibition.-Where a party made out a prima facie case for prohibition, and the party against whom the application was made objected to the granting of the writ, the court might direct the applicant to declare in prohibition: Worthington v. Jeffries, L. R. 10 C. P. 379. This was nothing more than an issue directed in a disputed case only, to inform the conscience of the court whether the court below had power to proceed. It could not be resorted to as a matter of course, but only by discretion of the prohibiting court, and then not without the concurrence of the defendant (respondent) who might allow the prohibition to go, in the first instance, without the expense of showing cause: London (Mayor) v. Cox, L. R. 2 H. L. 278; Pewtress v. Harvey, 1 B. & Ad. 154; Mittleberger v. Merritt, 2 U. C. R. 413.

The practice, in such cases, was prescribed by R. S. O. (1877) c. 52, This statute is now repealed: R. S. O. (1887) Shed. A. p. 2660; 51 Vic. c. 2, s. 2. All former practice inconsistent with the Consolidated Rules is also repealed: C. R. 3.

As the rules now provide for an appeal (C. R. 1139), there is less necessity for such a proceeding: Mackenochie v. Lord Penance, 6 App. Cas. 421 at p. 444.

In a proper case, the court might direct an issue to ascertain the actual facts.

Costs.—The costs are in the discretion of the court or Judge: C. R. 1170. A successful party is entitled to and should be awarded costs, unless the court, in the proper exercise of a wise discretion, can see good cause for depriving such party of them, and such party should not be deprived of costs, unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct of the litigation: McLeod v. Emigh, 12 P. R. 503; see Wallace v. Allen, L. R. 10 C. P. 607; Ex parte Overseers of Everton, L. R. 6 C. P. 245.

Where a defendant moved for prohibition, on the ground of want of territorial jurisdiction, before the hearing, and pending the motion, the

section inferior court transferred the plaint to the proper court, it was held, that the defendant was entitled to the costs of the motion: Olmstead v. Errington, 11 P. R. 366. Where the opposite party was not in fault, costs were refused: Re Howlley v. Young, 7 C. L. T. 346. It is not usual to give costs against the Judge: Re Johnson v. Therrien, 12 P. R. 442. Where there were no merits, but the plaintiff persisted in proceeding, costs were allowed: Rutherford v. Walls, 12 C. L. T. 205; see Nerlich v. Clifford, 6 P. R. 212: Mitchell v. Scribner, 20 O. R. 17; Field v. Rice, 20 O. R. 309.

> Damages. - After obtaining the order of prohibition, an action would seem to lie for the damages sustained by reason of the plaint being prosecuted in a court having no jurisdiction: Buller's N. P. 219; Cro. Car. 550; Mittleberger v. Merritt, 2 U. C. R. 413.

> Mandamus. - Mandamus is a writ issuable out of the High Court of Justice requiring the inferior court or the Judge or officer thereof to do some particular thing which appertains to their office or duty. It issues in all cases where the party hath a right to have anything done and hath no other specific means of compelling its performance: Shortt on Informations, 223.

> There must be a demand and refusal: Re Peck & Corp. of Peterborough, 34 U. C.R. 129. If any other remedy exists, e.g., app'ication to the Judge or appeal, the writ will not be granted: In re Marter and Gravenhurst, 18 O. R. 243.

> The application must be made in proper time: it must not be delayed too long, neither on the other hand must it be made prematurely: Shortt, 227, 250, 251; Re McCallum and Board of School Section 6, Tp. of Brant, 17 O. R. 451. Where a Judge, having heard the evidence, decides that he has no jurisdiction, a mandamus will not be granted to compel him to rehear it: Kernot v. Bailey, 2 U. C. L. J. 178; Ex parte Milner, 15 Jur. 1037. But see R. v. Southampton Co. Ct. Judge, 65 L. T. N. S. 320, in which it was held that mandamus lies to compel the Judge to hear a case after he has decided that he has no jurisdiction. The writ will only be granted when the jurisdiction of the inferior court is clear: Trainor v. Holcombe, 7 U. C. R. 548.

> It will not be granted to compel a Judge to alter an adjudication upon a matter within his jurisdiction, nor to compel the clark to act in disregard of the adjudication of the Judge: Coolican v. Hunter, 7 P. R. 237; nor to reverse the decision upon a point of practice: Re Woods v. Rennett, 12 U. C. R. 167. It will not be granted to compel a Judge to approve of security tendered for appeal, or to certify the proceedings after the expiration of the proper time: Ford v. Crabb, 8 U. C. R. 274; Orr v. Barrett, 9 C. L. T. 72; 6 Man. L. R. 300.

> Mandamus will issue to compel a Judge to try a case before him: Re Burns v. Butterfield, 12 U. C. R. 140, unless he is interested: Re Judge of Elgin, 20 U. C. R. 588. Where a Judge refused to adjudicate upon an interpleader summons, upon the ground that the notice of claim was insufficient, mandamus was granted: R. v. Richards, 2 L. M. & P. 263.

> A clerk may be compelled by mindamus to issue an execution: R. v. Fletcher, 2 E. & B. 279; Re Linden v. Buchanan, 29 U. C. R. 1; but his fee should be first tendered him: section 54; Re Township Clerk of Euphrasia, 12 U. C. R. 622.

> A Judge cannot be compelled by mindamus to exercise his discretion in a particular way: Re White v. Galbraith, 12 P. R. 513; Shortt, 260, 262, 301.

> The application for a mandamus should be upon notice to the Judge or officer and to the opposite party returnable not less than two clear

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he Judge wo clear days after service. It should be made to a Judge in Chambers: C. R. 1124. If the application is made to a Judge in court, costs only of a Chambers application will be allowed: Re Brookfield and Trustees of School Sec. 12, Tp. of Brooke, 12 P. R. 485. The motion should be supported by affidavits. All proceedings should be entitled, "In the High Court of Justice,

Division. In the matter of a certain plaint in the

Division Court, in the County of , wherein A.B. is plaintiff,

and C.D. is defendant."

Gambling Debt.—The question of what is a gambling debt, within the meaning of this section, is not discussed in any reported case. In Summerfeldt v. Worts, 12 O. R. 48, a sum due on a cheque given for losses in matching coppers, was held to be clearly a gambling debt.

It is submitted that a gambling debt, is, "any sum due as the result of a wager, or bet, or game of chance or skill." A wager or bet, is defined as a contract entered into without colour of fraud between two or more persons for a good consideration and upon mutual promises to pay a stipulated sum of money, or to deliver some other thing, to each other, according as some proposed and equally uncertain contingency should happen, within the terms upon which the contract was made: 2 Chitt. Stats. 3rd ed. Gaming, p. 276, note b; Bank of Toronto v. McDougall, 28 C. P. 345; Carlill v. Carbolic Smoke Ball Co., (1892), 2 Q. B. 484.

In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff for value after it was due, it was held no defence to the plaintiff 's transferror, that he received it in payment of a gambling debt: R. & J. 533; Burr v. Marsh, M. T. 4 Vict.

According to the Common Law of England. altered by 8 and 9 V. c. 109, (not in force in this Province), an action might be maintained on a wager, although the parties had no previous interest in the question on which it was laid, if it was not against the interest or feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy: Thackoorseydass v. Dhoudmull, 6 Moo. P. C. 300.

No action can be maintained by A. against B. on a wager in which A. bets that B. will, and B. that he will not pass his examination as an attorney, inasmuch as B. has the power of determining the wager in his own favor: Fisher v. Waltham, 4 Q. B. 889.

An agreement in the nature of a bargain, but which is in reality a bet, is invalid: Rourke v. Short, 5 E. & B. 904.

The employment of an agent to make a bet in his own name, on behalf of his principal, implies an authority to pay the bet if lost, and on the making of the bet that authority becomes irrevocable: Read v. Anderson, 10 Q. B. D. 100; 13 Q. B. D. 779, S. C.; Bridger v. Savage, 15 Q. B. D. 363; Bubb v. Yelverton; *In re* Ker, 24 L. T. N. S. 822.

Money paid in discharge of a lost bet made for another, is recoverable from such other person: Oldham v. Ramsden, 32 L. T. N. S. 825.

Money lent to enable the borrower to pay a bet, which he had already lost, would not, it is submitted, constitute a gambling debt within the meaning of this section, and would consequently be recoverable by the lender: Ex parte Pyke; In re Lister, 8 Ch. D. 754.

But money lent for the purpose of playing an illegal game would not be recoverable: McKinnell v. Robinson, 3 M. & W. 434.

Money lent by a licensed innkeeper for the purpose of enabling a guest to play an unlawful game, contrary to his license, would not be recoverable back: Foot v. Baker, 5 M. & G. 335.

As to money lent for gambling purposes, but not so used by borrower: see Tyler v. Carlisle, 1 Amer. St. R. 301 (U. S.).

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Section.

A stake-holder who receives bank notes as money, and pays them over originally to the original stake-holder after he has lost the wager, is answerable to the winner for money had and received to his use: Pickard v. Banks, 13 East, 20. But if he pays over the money to the party who has won, he is not liable to repay it to any person whomsoever: Brandon v. Hibbert, 4 Camp. 37; Brown v. Overbury, 11 Ex. 715.

Where A. and B. deposit money in the hands of a stake-holder to abide the event of a boxing match, and when the better A. claimed the whole sum from the stake-holder and threatened him with an action if he paid it over to B., which he nevertheless did by direction of the umpire: Held, that A. was entitled to recover from him his own stakes as money had and received to his own use, on the ground of its being an illegal wager: Hastelow v. Jackson, 8 B. & C. 221. It would be otherwise if no notice was given: Idem. To the same effect is Diggle v. Higgs, 2 Ex. D. 422; Trimble v. Hill, 5 App. Cas. 342; Hampden v. Walsh, 1 Q. B. D. 189. See also Logue v. McCuish, 21 N. S. Reps. 75.

The following American cases are referred to on the subject of gambling:

"Gambling" includes playing billiards for beer, oysters or cigars: State v. Bishel, 39 Iowa, 42; Hausberg v. People, 35 Alb. L. J. 98.

A horse-race is a gambling device: Joseph v. Miller, 2 New Mexico, 621.

The court said "The word 'gambling' is one of very general application, and is not restricted to wagering upon the result of any particular 'game or games of chance.' In the adjudicated cases on this subject we find that Judges often have applied this word indiscriminately to wagering of all kinds. We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case it is gambling. This is the popular understanding of the term 'gambling device,' and does not include any scheme, plan or contrivance for determining by chance which of the parties has won and which has lost a valuable stake. That a horse-race, when adopted for such a purpose, is a 'gambling device' there can be no doubt; See Shropshire v. Glascock and Garner, 4 Mo. 536, and cases there referred to."

"The word 'gaming' has been held to extend to physical contests whether of man or beast, when practised for the purpose of deciding wagers, or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices:" Boughner v. Meyer, 5 Colo. 71.

Spirituous or malt liquors.—The jurisdiction of the Division Court is not excluded in an action for spirituous or malt liquors alone. Their price may be recovered by a person having the right to sell them if they are "not drunk in a tavern or alehouse." Whether they have been so or not is a question for the Judge or jury to determine before proceeding with any other question in the case. If after hearing all the evidence adduced on that point, and it be decided that the liquors were not drunk in a tavern or alehouse, and the plaintiff otherwise had the right to sell the same, and the Judge determines that the court had jurisdiction, the cause could not be prohibited. Another court could not determine on an application for prohibition as to the correctness of his finding on the question of fact. It must be borne in mind that the right to sell such liquors in this province, is regulated by the Liquor License Act of Ontario (R. S. O. 1887, c. 194). If a person had not the right to sell such liquors

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The question whether liquors are "spirituous" or "malt" must be determined as any other question of fact: Harris v. Jenns, 9 C. B. N. S. 152.

"Spirituous" means containing, partaking of spirit; having the refined, strong, ardent quality of alcohol in greater or less degree. Hence, "spirituous liquors" imply such liquors as contain alcohol and thus have spirit, no matter by what particular name denominated, or in what liquid form or combination they appear. Hence, also, distilled liquor, fermented liquor, vinous liquor, are all alike spirituous liquors. Lager beer and wine contain alcohol and generally in such quantities and degree as to produce intoxication. These liquors are therefore spirituous: State v. Giersch, 37 Alb. L. J. 201. This was in North Carolina. In West Virginia, however, a different view of the matter is taken and it is held there that the term does not include wine or other fermented liquor, for the words imply that the beverage is composed in part or fully of alcohol extracted by distillation: State v. Oliver, 26 W. Va. 422; S. C. 53 Am. Reps. 79.

Although "Cronk" was sworn to be a kind of beer, the court would not take judicial notice that it was intoxicating or spirituous: R. v. Beard,

As to the meaning of the term "liquor" as used in the Liquor License Act: see Northcote v. Brunker, 14 A. R. at p. 373.

If there are several items in the bill, and the illegal ones are separable from the others, the legal ones are recoverable: Gilpin v. Rendle, 1 Selwyn's N. P. 61.

Where money is paid generally on account, without any specific appropriation at the time of payment, and part of the account is illegal (being a demand for liquor sold) and part legal, it is said the creditor would have the right to apply the money on the demand for liquor sold: Philpott v. Jones, 2 A. & E. 41; Cruickshank v. Rose, 5 C. & P. 19; Simpson v. Ingham, 2 B. & C. p. 72; Hooper v. Keay, 1 Q. B. D. 178; Kinnaird v. Webster, 10 Ch. D. 139.

Cross demands may be settled, even though there is a claim for liquor in one of them, and not recoverable for. It is only the right to recover which the statute bars, not the right to pay for them: Dawson v. Remnant, 6 Esp. 24.

Tavern or alchouse.—It is submitted that these words mean licensed places. No debt could be created for sale of liquors drunk anywhere without there being a license to sell: Ritchie v. Smith, 6 C. B. 462.

A tavern is defined to be "A house licensed to sell liquors to be drunk on the spot, with accommodation and entertainment for travellers:" Nuttall's Standard Dictionary Worcester's definition is, "A public house where wine and liquors are sold and entertainment for a party are provided." An "alehouse" is a place where excisable liquors are sold by retail to be drunk on the premises. The word is probably synonymous with "public house" and "tavern" which latter words were employed in London and Suburban Land Co. v. Field, 16 Ch. D. 645; Holt v. Collyer, 16 Ch. D. 718; Stroud, 27.

Additions to licensed premises do not destroy their character, the question is, are they substantially the same: R. v. Raffles, 1 Q. B. D. 207; R. v. Smith, 15 L. T. N. S. 178; Stringer v. Huddersfield, 33 L. T.

It must always be kept in view that in order to oust the jurisdiction of the court, the liquors sued for must be drunk in one or the other of the places mentioned in this section.

A person licensed to sell beer, "to be drunk or consumed off the premises," who supplied a pint of beer to a traveller who sat upon a bench placed and fastened against the wall of the house, returning the mug in which he was served, was held to have been properly convicted of selling beer to be drunk on the premises: Cross v. Watts, 13 C. B. N. S. 239. See also Bath v. White, 3 C. P. D. 175; Brigden v. Heighes, 1 Q. B. D. 330; R. v. Palmer, 46 U. C. R. 262.

But ale handed through a window to a customer who called for it and drank part of it whilst standing on the highway, was held not to have been sold "to be consumed on the premises," though he drank the remainder whilst sitting on the window sill of the house: Deal v. Schofield,

L. R. 3 Q. B. 8.

Illegal promissory notes.—" Notes of hand," by which is evidently meant promissory notes, cheques, and "all evidences of debt under the hand of the debtor," given for any of the prohibited matters or things are not within the jurisdiction of the Division Court: In re Summerfelt v. Worts, 12 O. R. 48.

The "note of hand" is not suable in the Division Court, even though in the hands of an innocent holder: In re Summerfelt v. Worts, 12 O. R. 48; Harper v. Young, 34 Alb. L. J. 376; 37 Alb. I. J. 181. But in another court it would possibly be: Bowen v. Webber, 34 Alb. L. J. 76; The Canadian Bank of Commerce v. Gourley, 30 C. P. 583.

If a note should in form be given for a loan of money, but in reality for one of the prohibited considerations, it would be within this section: Hill y. Fox. 4 H. & N. 359.

See notes to sub-section 1 of this section.

Actions for the recovery of land.—The language of this sub-section has been somewhat changed to make it more consistent with the Ontario Judicature Act. Under the former Act the words were "Actions of Ejectment." The meaning is substantially the same, and wherever jurisdiction was formerly excluded as virtually being an action of ejectment, so also is jurisdiction excluded under this sub-section.

When jurisdiction ousted .- The title of a corporeal hereditament is in que calon whether its existence or the right of the claimant to it, is denied: Adey v. Deputy-Master of Trinity House, 22 L. J. Q. B. 3; S. C. 1 E. & B. 273, sub. nom. R. v. Everett. There must be some show of reason for the claim: Cornwell v. Sanders, 3 B. & S. 206. The claim must be a bona fide one, and the right one that can exist in point of law: Hudson v. MacRae, 4 B. & S. 585; Lloyd v. Jones, 6 C. B. 81. It must be of such a nature as, if substantiated, would form a defence to the action: Leath v. Vine, 30 L. J. M. C. 207. If the defendant actually bring the title in question, then, although his claim may be fraudulent or founded on the most utter bad faith, the court will have no jurisdiction: Marsh v. Dewes, 17 Jur. 558. Where in an action of tort for personal chattels, the title to land comes incidentally in question, the jurisdiction is ousted: Trainor v. Holcombe, 7 U. C. R. 548. Where the question was whether certain goods were part of the freehold or not the jurisdiction was held to be ousted: Portman v. Patterson, 21 U. C. R. 237; but in a later case, it was held to be a question of fact, and if the inferior court Judge decided that the chattel was not part of the freehold, the jurisdiction was not ousted: Re Bushell v. Moss, 11 P. R. 251; see McNeill v. Haines, 13 P. R. 115; Macara v. Dines, 2 West. L. T. 99. The earlier case of Portman v. Patterson was not cited. Where a defendant claimed the right to obstruct a street it was held that title was brought in question: R. v. Taylor, 8 U. C. R. 257; so also where a right of way was claimed across a railway: Cole v. Miles, W. N. (1888) 150. Where, if the parties had been landlord and tenant, the court would have

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had jurisdiction, but defendant claimed to be a freeholder, the jurisdiction was ousted: Pearson v. Glazebrook, L. R. 3 Ex. 27; but where, in an action for double rent the tenant was estopped from denying his landlord's title, his claim of title was of no avail: Wickham v. Lee, 12 Q. B. 521; Bank of Montreal v. Gilchrist, 6 A. R. 659: but it would have been otherwise if the defendant had shewn that his lessor's title expired during the tenancy: Mountnoy v. Collier, 1 E. & B. 630. Where a demise is admitted, but the subject matter thereof, e.g., whether certain rooms in a cottage are included, is in dispute, the jurisdiction is ousted: Chew v. Holroyd, 8 Ex. 249. Where in an action for rent, the defendant set up that the rent belonged to a third party to whom it had been paid, the jurisdiction was ousted: Fair v. McCrow, 31 U. C. R. 599; see, however, Whitling v. Sharples, 9 C. L. T. 141. If a party is charged with liability by reason of ownership of certain land, and he denies that ownership, title is in question: R. v. Harden, 2 E. & B. 187. Though the fact that title came in question does not appear on the face of the proceedings, prohibition may be granted: Marsden v. Wardle, 3 E. & B. 695. Application may, however, be made before trial in the inferior court, and prohibition will be awarded if it appear that title must come in question: Macara v. Morrish, 11 C. P. 75; Sewell v. Jones, 15 Jur. 153; 1 L. M. & P. 525; see other cases where jurisdiction ousted: R. v. Davidson, 45 U. C. R. 91; R. v. McDonald, 12 O. R. 381. In these cases a mere bona fide claim of right was sufficient, but in Division Courts title must be in question. Where it is necessary to prove that a married woman has separate estate, and no evidence can be given of the possession of any personal estate in respect of which she may be deemed to have contracted, and a bona fide question arises whether she has title to certain lands, it seems that the jurisdiction is ousted: Re Widmeyer v. McMahon, 32 C. P. 191, 194, in which, however, the title of the married woman was not disputed or brought in question.

When not ousted .- The mere assertion by a solicitor of a claim of right is insufficient. Title must be in question: Re Emery v. Barnett, 4 C. B. N. S. 423; Lilley v. Harvey, 5 D. & L. 648; 12 Jur. 1026; R. v. Sandford, 30 L. T. N. S. 601; Ball v. G. T. R. 16 C. P. 252. Where a lessor has certain rights under a lease, and sells, the mere proof by the vendee in an action against the lessee of his proper title, does not oust the jurisdiction: see Neads v. McMillan, 29 U. C. R. 415; R. v. Priest, W. N. (1887) 65. Where the question was whether certain rails forming a line fence put by mistake on another's land were the property of the party putting fhem there, title to land was not in question: Re Bradshaw v. Duffy, 4 P. R. 50. The terms of a tenancy do not form matter of title: Re English v. Mulholland, 9 P. R. 145; Re Knight, 1 Ex. 802. The question whether a right to impound is implied from a right to pasturage, is not a question of title: Graham v. Spettigue, 12 A. R. 261. Nor is the question whether a municipality is bound to repair a road: Knight v. Medora (Township), 11 O. R. 138; 14 A. R. 112; nor whether a stream is navigable: Reece v. Miller, 8 Q. B. D. 626. In an action of false imprisonment, no question of title can arise: Eversfield v. Newman, 4 C. B. N. S. 418.

Procedure.—It is the duty of the Judge to inquire and decide whether title is really in dispute, but his decision is not final: Thompson v. Ingham, 14 Q. B. 710; Re Emery v. Barnett, 4 C. B. N. S. 423; Re Huntsworth, 33 L. J. M. C. 131; but where he has decided upon conflicting evidence, the court will not interfere except upon very strong grounds: Long Point Co. v. Anderson, 18 A. R. 408; Re Bowen, 21 L. J. Q. B. 10; 15 Jur. 1196; Brown v. Cocking, L. R. 3 Q. B. 672; Enraght v. Lord Penzance, 7 App. Cas. 240; Macara v. Dines, 2 West. L. T. 99. The rule laid down in Re Bushell v. Moss, 11 P. R. 251, seems wider

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than that of the other cases. If the claim of title is ignored the Judge should state clearly his grounds for so doing: Birnie v. Marshall, 35 L. T. N. S. 373. The action simply stops for want of jurisdiction. A non-suit cannot be entered: Lawford v. Partridge, 1 H. & N. 621.

Care must be taken to distinguish cases in which the right to Superior Court costs was upheld, upon the ground that title was in question, from cases where the question is, Has an inferior court jurisdiction? The right to Superior Court costs depends upon the pleadings and not upon what takes place at the trial. The pleas of non demisit or not possessed, have been held in Ontario, to raise the question of title: Purser v. Bradburne, 7 P. R. 18; Coulson v. O'Connell, 29 C. P. 341. A mere general denial of the allegations in the statement of claim, may raise a question of title sufficient to entitle the plaintiff to Superior Court costs: Worman v. Brady, 12 P. R. 618; Danaher v. Little, 13 P. R. 363; Flett v. Way, 14 P. R. 312. When the question, however, is, Has an inferior court jurisdiction? it is material to enquire what took place, or must necessarily take place, at the trial. The court has to be satisfied that title really comes in question before prohibition will be granted; Re Crawford v. Seney, 17 O. R. 74.

Exceptions.—In the following matters Division Courts have jurisdiction, though the title to land is in question: (a) Actions for damage to land by overflowing the same for the purpose of driving logs, timber, or a sawmill, where the sum claimed does not exceed \$20: 52 Vic. c. 16, s. 13 (1889). (b) Interpleader proceedings: e.g., growing crops seized may be claimed by a mortgagee as part of the land, or rent due for the premises may be claimed by adverse parties; and though, for that purpose, it is necessary to examine the title to land, the jurisdiction will not be ousted. It is a collateral question arising in a matter collateral to the action: Munsie v. McKinley, 15 C. P. 50.

Hereditament.—"The settled sense of that word is to denote such things as may be the subject matter of inheritance but not the inheritance itself:" Moore v. Denn, 2 B. & P. 247.

"Corporeal hereditament" includes land, and the Division Court has no jurisdiction, though the title to a leasehold only may be in question: Tomkins v. Jones, 22 Q. B. D. 599.

An "inexporeal hereditament" is a right issuing out of a thing corporate, (whether real or personal); or concerning or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels or the like; but something collateral thereto, as a rent issuing cut of those lands or houses, or an office relating to those jewels: Kerr's Blackstone 16; Re Christmas. 33 Ch. D. 332. Rents, rights of way and aqueduct, rights to light, rights to customary fees, etc., are instances of corporeal hereditaments: Stephenson v. Raine, 2 E. & B. 744. There must be a dominant and a servient tenement. The right to ground a barge on a navigable river, is not a claim to an incorporeal hereditament: Hawkins v. Rutter, (1892), 1 Q. B. 668.

Toll.—A toll is defined to be a tax paid for any liberty or privilege:—It is the title to the toll that must come in question to oust the jurisdiction: Hunt v. The Great Northern Ry. Co., 10 C. B. 904, per Jervis, C.J., and Williams, J. The charges of the railway company for conveyance of goods are not within this part of the section: Ib. Harbour rates are tolls: R. v. Everett, 1 E. & B. 273; but payments to a railway company for use of locomotive power, as distinguished from the use of their railway, are not: Hunt v. Great Northern Ry. Co. supra. The right to take toll under an Act of Parliament must clearly appear, and any doubt is given in favor of the public: Stourbridge Canal Co. v. Wheeley, 2 B. & Ad. 792. A mere claim of right to tolls without shewing that it is a bona

fide claim would not oust the jurisdiction of the court: R. v. Hampshire Jus., 3 Dowl. 47.

Section 69

Custom.—This limitation is not in the English Act, and it has there been held that the County Courts may try a disputed custom: Davis v. Walton, 8 Ex. 153. The word appears to be used here in its technical sense, as signifying local common law: Hammerton v. Honey, 24 W. R. 603; Grand Hotel Co. v. Cross, 44 U. C. R. 169. Inasmuch as a custom to take fish, or to take water, would be bad as a profit a prendre, the jurisdiction of the Division Courts would not be excluded by setting it up: Lloyd v. Jones, 5 D. & L. 784. It is doubtful if a custom can be proved in this Province, there being no "time immemorial" on which to found it: Grand Hotel Co. v. Cross, 44 U. C. R. 153.

Franchise, an incorporeal hereditament synonymous with liberty. A royal privilege or branch of the Crown's prerogative subsisting in the hands of a subject. It arises either from royal grants, or from prescription which presupposes a grant. The kinds are almost infinite, but the principal are bodies-corporate, the right to hold court-leets, tairs, markets, ferries, forests, chases, parks, warrens, fisheries. The remedy for disturbance is an action: 1 Step. Com. Also, the right of voting at an election of a member of parliament: Wharton, 313. See Anderson v. Jellett, 9 S. C. R. 1.

A patent is a franchise, and a question concerning its validity cannot be tried in the Division Court: R. v. Co. Ct. Judge of Halifax, (1891), 2 Q. B. 263.

Validity of Devise, &c., Disputed.—Whenever there is any dispute as to the validity of any devise, bequest or limitation under any will or settlement, then the jurisdiction of the Division Court to inquire into the same is at an end.

Malicious prosecution .. - "To put the Criminal Law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person there is that conjunction of injury and loss which is the foundation of an action:"
Addison on Torts, 5th ed., 199. If the particulars of a claim should show good cause of action for false imprisonment, the proceedings in Division Court would not be restrained, because the Judge, in giving judgment, used expressions indicating that he gave damages for malicious prosecution: Chivers v. Savage, 5 E. & B. 697. Should the particulars be framed so as substantially to show a case of malicious prosecution the court cannot entertain it: Jones v. Currey, 2 L. M. & P. 474. In Hunt v. North Staffordshire Ry. Co., 2 H. & N. 451, the particulars were as follows: "£17 12s. 6d. being for moneys paid for loss of time and attendance before the magistrates, upon a complaint and information of W. on behalf of the defendants." The plaintiff had been summoned before the magistrates for riding in a railway carriage without having paid his fare, and the summons was dismissed with costs, and the action was brought to recover the expenses occasioned It was held that the action was, in substance, by such summons. for malicious prosecution, and was beyond the jurisdiction. A count that the defendant caused plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a count in trespass for assault and false imprisonment, and not a count for malicious prosecution: Brandt v. Craddock, 27 L. J. Ex. 314 (Amer. reprint, 3 H. & N. 958). The defendant's wife gave the plaintiff into the charge of a constable on an unfounded charge of felony. The defendant attended at the police station, and, after having been cautioned by the inspector on duty that he would not incur the responsibility of detaining the plaintiff unless the

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defendant distinctly charged him with felony and signed the charge sheet; the defendant signed the charge sheet, and the plaintiff was detained, and taken next morning before the magistrates, who discharged him. The plaintiff took out a plaint in a county court for false imprisonment, accompanying it with a notice, whereby he expressly disclaimed any cause of action, in respect of the malicious prosecution. The Judge, erroneously treating the signing of the charge sheet as the commencement of a malicious prosecution, ruled that the whole was one continuous transaction, and that the false imprisonment could not be separated from the the rest, and consequently, that he had no jurisdiction and non-suited the plaintiff. The Court of Common Pleas, on appeal, directed a new trial: Austin v. Dowling, L. R. 5 C. P. 534.

Libel.—"It is enough to make a written statement prima facie libellous, that it is injurious to the character or credit (domestic, public or professional) of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred or contempt, or ridicule. When we call a statement prima facie libellous, we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification or excuse:" Pollock on Torts, 206, 207; Roscoe's N. P. 855; Odgers on Libel and Slander; Stroud, 435.

Slander.-" Slander is an actionable wrong when special damage can be shewn to have followed from the utterance of the words complained of, and also in the following cases:—Where the words impute a criminal offence; where they impute having a contagious disease which would cause the person having it to be excluded from society; where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession or trade; in short, where they manifestly tend to prejudice a man in his calling. Spoken words which afford a cause of action without proof of special damage are said to be actionable per se: the theory being that their tendency to injure the plaintiff's reputation is so manifest that the law does not require evidence of their having actually injured it. There is much cause, however, to deem this and other like reasons given in our modern books mere after thoughts, devised to justify the results of historical accident: a thing so common in current expositions of English law that we need not dwell upon this example of it:" Pollock on Torts, 206; Roscoe's N. P. 865. See also Odgers on Libel and Slander: R. S. O. c. 57.

Griminal Conversation.—"Against an adulterer the husband had an action at common law, commonly known as an action of criminal conversation. In form it was generally trespass vi et armis, on the theory that 'a wife is not, as regards her husband, a free agent or separate person,' and therefore her consent was immaterial, and the husband might sue the adulterer as he might have sued any mere trespasser who beat, imprisoned or carried away his wife against her will": Pollock on Torts, 196, 197.

Strict proof of the marriage in such case is necessary: Taylor on Ev. 8th Ed. 190, 191.

Seduction.—This cause of action is also excluded from the jurisdiction of the Divisional Court: Meyer v. Bell, 13 O. R. 35; Appleby v. Franklin, 17 Q. B. D. 93.

Breach of Promise of Marriage.—It will be seen, too, that the action of breach of promise of marriage is also specially excluded from Division Court jurisdiction. It is unnecessary to enlarge upon this form of action.

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Actions against a J. P .- No action can be brought against a Justice Sections of the Peace in the Division Court for anything he has done in the execution of his office, if he objects thereto. This prohibition probably also applies to every other officer and person fulfilling a public duty: R. S. O. c. 73, s. 1, s.-s. 2, s. 16.

If a magistrate should be sued in the Division Court for an act done in the execution of his office, and has given notice of his objection thereto, he cannot remove the suit by certiorari into a Superior Court: Weston v. Sneyd, 1 H. & N. 703. At page 705, Pollock, C.B, is reported to have said; "The notice given put an end to the proceedings in the County Court, and the plaintiff was in the same position as if the action had never been brought.

The notice which the justice may give must, we think, be in writing now: section 93. It must be given within six days from service of notice of action: R. S. O. c. 73, s. 16.

If the action be brought in any other court, and a recovery only within the jurisdiction of the Division Court, the plaintiff can only have costs on the scale of that court: Ireland v. Pitcher, 11 P. R. 403.

70. (1) The Division Courts shall have jurisdiction Cases in in the following cases:

inrisdiction.

- (a) All personal actions where the amount claimed does not exceed \$60. R. S. O. 1877, c. 47, s. 54 (1); 43 V. c. 8, s. 3.
- (b) All claims and demands of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100. 41 V. c. 8, s. 6.
- (c) All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed \$200 and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents. 43 V. c. 8, s. 2, part.

and except in cases in which a jury is legally demanded by a party as hereinafter provided, the Judge shall hear and determine in a summary way all questions of law and fact and may make such orders or judgments as appear to him just and agreeable to equity and good conscience, which

shall be final and conclusive between the parties, except as - herein otherwise provided. R.S.O. 1877, c. 47, s. 54; part.

Absconding debtors.

(2) In the class of cases provided for by paragraph (c) of the preceding sub-section, the increased jurisdiction thereby referred shall apply to claims and proceedings agains as adding debtors under section 249, and subsequent sections of this Act; and in such cases the attachment may issue and proceedings may be had on a claim of not less than \$4 and not more than \$200. 43 V. c. 8, s. 4.

Combining causes of action.

- (3) Claims combining:
 - (a) A cause or causes of action in respect of which the jurisdiction of the Division Courts, is by the foregoing sub-sections of this section, limited to \$60, which causes of action are hereinafter designated as class (a) and
 - (b) A cause or causes of action in respect of which the jurisdiction of the said Courts is by the said sub-sections limited to \$100, which causes of action are hereinafter designated as class (b)
 - (c) A cause or causes of action in respect of which the jurisdiction of the said Courts is by the said sub-sections limited to \$200, which causes of action are hereinafter designated as class (c)

may be tried and disposed of in one action, and the said Courts shall have jurisdiction so to try the same; provided that the whole amount claimed in any such action in respect of class (a), shall not exceed \$60; and that the whole amount claimed in any action in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), shall not exceed \$100, and that the whole amount claimed in respect of classes (a) and (c) or (b) and (c) combined, shall not exceed \$200, and that in respect of classes (b) and (c) combined, the whole amount claimed in respect of class (b) shall not exceed \$100.

(4) The finding of the Court upon the claims when so Section joined as aforesaid shall be separate. 49 V. c. 15, s, 6.

All personal actions.—This gives the court jurisdiction in all actions which were maintainable at common law both ex contractu and ex delicto, where the amount claimed does not exceed \$60, provided they do not fall under the prohibitions of section 69. "Personal actions," at common law, were "such actions whereby a man claims debt or other goods and chattels or damages for them or damages for wrong done to his person": Termes de la Ley, 18; Atty.-Genl. v. Churchill, 8 M. & W. 192. They divide themselves into debt, covenant, detinue, trespass, replevin and trespass on the case, the last including all cases of wrong where the injury was not immediate or direct but purely consequential or indirect: Scott v. Shepherd, 2 Bl. 892; 1 Sm. L. C. 737; Stephen on Pleading, 14. Although the claim in detinue is for a return of the goods or their value, it is a personal action; and the court has jurisdiction: Lucas v. Elliott, 9 U. C. L. J. 147; Wms. Personal Pty. 3.

Class (b) extends to all actions on contracts where moneys due, or damages not exceeding \$100, are sought to be recovered: Morris v. Cameron, 12 C. P. 422; O'Brien v. Irving, 7 P. R. 308.

The amount claimed must not be the balance of an unsettled account where such account, in the whole, exceeds \$400: see section 77.

The plaintiff cannot give the court jurisdiction by giving the defendant credit by way of set-off for an amount which the defendant has not admitted to be correct: Furnival v. Saunders, 26 U. C. R. 119. set-off must be admitted by both parties: Hubbard v. Goodley, 25 Q. B. D. 156; and it is a question of fact whether the parties have agreed to set-off one against the other, and the decision of the Judge will not be reviewed: Re Jenkins v. Miller, 10 P. R. 95.

A claim for less than \$100 by a mortgagor against a mortgagee for an alleged surplus after a mortgage sale, which realized less than \$400, may be sued under this sub-section: Re Legarie v. Canada Loan and Banking Co., 11 P. R. 512. "It is an equitable cause of action for money had and received:" Reddick v. Traders Bank, 22 O. R. 449; but see Hutson v. Valliers, 19 A. R. 154.

A claim of \$100 and interest would be beyond the jurisdiction: Insley v. Jones, 4 Ex. D. 16.

Class (c).—The amount, or original amount of the claim must be ascertained by the signature of the defendant or his testator or intestate. No matter how large the original amount of the claim may be, if the amount claimed in the action is less than \$200, the signature of the party for the original amount gives jurisdiction: Bank of Ottawa v. McLaughlin, 8 A. R. 543.

The Judges are divided in opinion as to whether the liability must appear upon the instrument, or whether it is sufficient to produce a writing in which an amount is mentioned leaving it to other evidence to shew whether there is a cause of action or not. In support of the first view, are Spragge, C.J.O., Osler, J.A., Rose, J., Robertson, J., Proudfoot, J., Ferguson, J., and perhaps the Court of Appeal: see McDermid v. McDermid, 15 A. R. 292, 293. The other view is maintained by the Queen's Bench Divisional Court (Armour, C.J., and Falconbridge, J.,): Graham v. Tomlinson, 12 P. R. 367. At page 370, Armour, C.J., says: "The statute does not require that the debt shall be ascertained * * * nor that the claim to recover * * * shall be so ascertained, but only that the amount shall be ascertained."

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TABLE OF CASES.

NAME	CASE.	INSTRUMENT SIGNED.	Court.	DECISION.
	McCracken v. Creswick, 8 P.R. 501.	Pro. Note for \$73.14 with interest Am't claimed, \$103.41.	Hagarty, C.J	Fixed legal damages in the nature of interest need not be under signa- ture of defendant, the original amount being fixed.
	Kinsey v.Roche, 8 P. R 515.	Joint note for \$169 paid by surety Ac- tion by him to recover	Osler, J.	Action not on note, but for money paid. No jurisdiction.
	Re Widmeyer v. McMahon, 32 C. P. 187.	Pro note for \$158 with interest. Amount claimed, \$185.65.	C. P. D	McCracken v. Creswick, followed.
1883 Feb. 6.	Wiltsie v. Ward, 8 A. R. 549.	Accepted order for \$140 payable on con- dition of fulfilment of contract	Spragge, CJO	No jurisdiction.
1883 Dec. 21.	Forfar v. Climie, 10 P. R. 80,	Action on order for boiler. Price \$115.	Rose, J.	Writing ascertains only amount that might be- come due. No jurisdic- tion.
1888 Feb. 6.	Re Graham v. Tombinson, 12 P. R. 367.	Indorsem'nt on cheque for \$100 Action for \$100 loaned and \$22 interest.	Q. B. D,	Sufficient if the amoun ascertained by any writing adduced mevidence
1888 June 20.	McDermid v, McDermid, 15 A. R. 287.	Bond for \$500 conditioned to pay mort- gage for \$250. Plain- tiff paid \$163.	С, А,	The debt or money de mand arises from pay ment of the money, and the amount is not ascer tained by the writing ir the sense required to give jurisdiction.
1889 Jan. 9. June 12.	Moses v. Moses, 13 P. R. 12. Moses v. Moses, 13 P. R. 144.	son Joseph to take	Ch. D.	"The plaintiff having t establish consideration outside the paper th debt is not ascertained by proving the signatur alone."
1890 May 30	Re Smith v. Grant, 10 C. L. T. 190.	"Good to Sam Smith on presentation in person \$150 78 during summer of 1884 as per amount deposited with me.		The acknowledgmen was given after liability accrued and was a acknowledgment of a existing liability.
1892	Re Trimble v. Miller, 12 C. L. T. 413.	Undertaking to pay third party \$375.	C, P. D.	Even if pro. note, onlentitled to benefit of third party, and plain tiff could sue only for breach of undertaking
1888	McRobbie v. Torence, 5 Man L. R. 114.			An agreement merely.

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There are also the following cases in inferior Courts.

Section 70

NAME AND DATE OF CASE.		INSTRUMENT SIGNED.	Court.	DECISION.
1881 Jan.	Stewart v. For- syth, 17 L. J. N. S 87.	Order for reaping ma- chine to be supplied and agreement to give notes therefor.	sex.	The original amount ascertained. (This is not consistent with later cases).
	Burns v. Rogers, 17 L. J. N. S. 209.	Pro. Note.	C. C. Leeds.	That notarials recoverable as ascertained.
1881 Feb.	Manufacturers & Mer. M. Ins. Co. v. Campbell, 1 C. L. T. 134.		1st Div. Ct. Wentworth.	Not an absolute promise to pay a certain sum at a fixed time.

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The amount must be ascertained by the signature of the parties prior to the commencement of the action: Lucas v. Dixon, 22 Q. B. D. 357; Re Graham v. Tomlinson, 12 P. R. 367. The parties by their joint act must ascertain the amount as by stating an account: Robb v. Murray, 16 A. R. 503; Re McKay v. Martin, 21 O. R. 104.

Though the plaintiff may sue in a higher court upon the original consideration, he will not obtain the costs of that court if the amount has been ascertained by the signature of the defendant, as by an acceptance: White Sewing Machine Co. v. Belfry, 10 P. R. 64; see Vanderwaters v. Horton. 9 O. R. 548.

No more than \$200 can be recovered in the action Where interest would bring the amount over \$200, the excess must be abandoned or prohibition will be awarded quousque until judgment is reduced to proper amount; or partial prohibition may be awarded as to the excess: Re Young v. Morden, 10 P. R. 276; Re Elliott v. Biette, 21 O. R. 595.

A claim aggregating more than \$100, made up of two amounts, one ascertained by signature, and the other not so, was not within the jurisdiction prior to the revision of the statutes: Re Walsh v. Elliott, 11 P. R. 520; but this is not now law as class (c) above could not, as the law then stood, be combined with classes (a) or (b).

What is a signature.—A signature is the writing or otherwise affixing a person's name, or a mark to represent his name, by himself or by his authority: R. v. Justices of Kent, L. R. 8 Q. B. 305; 42 L. J. U. C. 112.

A stamped impression is sufficient: Jenkyns v. Gaisford, 3 Sw. & Tr. 93; Bennett v. Brumfitt, L. R. 3 C. P. 28. A mark is sufficient even though the name should not be affixed: Baker v. Dening, 8 A. & E. 94; Re Field, 3 Curt. 752; or if a wrong name should be written: Re Glover, 11 Jur. 1022; or an assumed name: Re Redding, 14 Jur. 1052. Initials are perfectly good: Re Wingrove, 15 Jur. 91. The signature may be either at the top or bottom: Durrell v. Evans, 1 H. & C. 174; and even the name of the debtor on a printed billhead upon which the ascertainment of the amount appeared would perhaps be sufficient: Schneider v. Norris, 2 M. & S. 286; Evans v. Hoare, (1892), 1 Q. B. 593. A signature by an agent would be sufficient: R. v. Justices of Kent, L. R. & Q. R. 305. A forgery cannot be ratified: Merchants Bank v. Lucas, 18 S. C. R. 704.

By the English County Court Rules, 1889, particulars of claim were required to be signed by a solicitor. *Held*, that a lithographed signature was insufficient: R. v. Cowper, 24 Q. B. D. 533; but that signature by

an authorized clerk was sufficient: France v. Dutton, (1891), 2 Q. B. 208. It would not be necessary that the signature should show the agency: Re Whitley Partners (Limited), 32 Ch. D. 337. Even the signature in the agent's own name would probably be sufficient: Commins v. Scott, L. R. 20 Eq. 11; Wylson v. Dunn, 34 Ch. D. 575. It would not be necessary that the agent's authority should be in writing: Emmerson v. Heelis, 2 Taunt, 38.

"The most usual mode is by an unwritten request or by implication from the recognition of the principal, or from his acquiescence in the acts of the agent": Evans Prin. & Agt. 21. But mere proof that an agent has been recognized as such in other transactions, would be insufficient: Myles v. Thompson, 23 U. C. R. 553. The authority might be by telegram: Marshall v. Jamieson, 42 U. C. R. 115; Lilly v. Smales, 8 T. L. R. 410. Instruments which are defective as promissory notes, either for uncertainty or as containing other agreements, or for any other cause would be sufficient acknowledgments within this sub-section: Palmer v. Fahnestock, 9 C. P. 172; 20 U. C. R. 307; Grant v. Young, 23 U. C. R. 387; Third National Bank of Chicago v. Cosby, 41 U. C. R. 402; 43 U. C. R. 58.

An assignee of the debt might maintain the action: R. S. O. c. 122, s. 7.

Even though particulars of claim should show a claim in excess of \$200, the excess might be abandoned at the trial: *Re* White v. Galbraith, 12 P. R. 513.

Jury.—The section apparently overlooks section 168 allowing the Judge to call a jury upon his own motion.

Judge may make orders agreeable to equity and good conscience.— This is a somewhat obscure provision. It expressly authorizes a Judge, however, to do what he, as an arbitrator, may consider just, and does not bind him to observe technical rules either of law or equity. The provision, however, adds nothing to the practical effect of unappealable cases in which his decision, no matter how wrong it may be, in point of law, cannot be reviewed: See ante, note on Prohibition: Home v. Camden, 2 H. Bl. 536.

In appealable cases, it would doubtless be found, that no matter what the views of a Division Court Judge on equity and good conscience, they would be corrected, if not in conformity with law. The provision was referred to by Boyd, C., in Legarie v. Canada Loan and Banking Co., 11 P. R. 512.

Absconding Debtors.—It will be noticed that a claim against an absconding debtor must not exceed \$100, unless the amount is ascertained by the signature of the defendant.

Combining causes of action.—The following are examples of claims which may be combined:—

\$60 for tort, and \$140 on promissory note.

\$60 for tort, \$40 on open account, and \$100 on note.

\$10 for tort, \$90 damages for breach of contract, and \$100 on note.

\$99 for damages for breach of contract, and \$101 on note.

\$50 damages for breach of contract, \$50 on open account, and \$100 on note.

\$100 on note, \$40 for tort, and \$60 open account.

The joinder of several distinct causes of action against the same defendants is authorized, but not the joinder of several actions against distinct persons: Burstall v. Beyfus, 26 Ch. D. 35.

71. Upon any contract for the payment of a sum Sections 71.72 certain in labour or in any kind of goods or commodities Judge may or in any other manner than in money, the Judge, after the order payment in day has passed on which the goods or commodities ought money, although to have been delivered or the labour or other thing per-contract formed, may give judgment for the amount in money as if payment in money. the contract had been originally so expressed. R. S. O. 1877, c. 47, s. 55.

The object of this section is to provide for a class of cases which frequently arise in the country. Agreements are frequently entered into by which, in the form of a promissory note, a person undertakes to pay a certain sum in some designated commodity. According to the well-known principles of law, this would in the higher courts, have to be declared for and recovered upon as an ordinary simple contract debt, the consideration necessarily being alleged and proved. The section in question appears to place such a transaction, after the day for performance has expired, much in the same light as a liability upon a promissory note, and the Judge may view the transaction and give judgment as if the contract had originally been expressed as payable in money.

Generally a demand would not be necessary by the plaintiff before the suit, it being incumbent on the defendant to offer to perform the work or otherwise fulfil his promise: Teal v. Clarkson, 4 O. S. 372; Jones v. Gibbons, 8 Ex. 920; Crabtree v. Messersmith, 19 Iowa R. 179; 1 American Law Review, 538. Should the contract be to deliver wheat "F. O. B." it would be the duty of the buyer to provide cars for the shipment, and if not done there would be no breach: Marshall v. Jamieson, 42

U. C. R. 115.

If personal services are proffered and refused there could be no recovery: Murray v. Black, 21 O. R. 372.

The contract would be assignable: R. S. O. c. 122, s. 7.

72. The Division Courts shall also have jurisdiction in Jurisdicall actions of replevin where the value of the goods or other replevin. property or effects distrained, taken or detained, does not c. 55. exceed the sum of \$60, as provided in The Replevin Act. R. S. O. 1877, c. 47, s. 56; 43 V. c. 8, s. 3.

Replevin.—Formerly the value of the property recoverable in replevin was limited to \$40. Now it is extended to \$60. The Replevin Act is

R. S. O. c. 55. By C. R. 1104, it is provided, that "Where an order of replevin is issued out for any personal property which had not been previously taken out of the plaintiff's possession, and for which the plaintiff might formerly have brought an action of trespassor trover, the defendant shall be entitled, if the plaintiff fails in the action, to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may incur in defending the action; and the bond to be taken by the sheriff or bailiff shall be conditioned not only as heretofore required in that behalf, but also to indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of

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its being returned, and all costs, charges, and expenses which the defendant may incur including reasonable costs not taxable between party and party: This Rule shall not apply to cases of distress for rent or damage feasant."

This provision was inserted to provide for the defect shewn to exist in Williams v. Crow, 10 A. R. 301. It is very doubtful whether, since the repeal of the section from which the rule is taken, by the Revision of the Statutes, the provision is applicable to Division Conrts: See notes to secs. 73 and 304.

The following are the sections of the Replevin Act applicable to Division Courts:—

WHEN GOODS REPLEVIABLE.

"2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully of trained under circumstances in which by the law of England, on the day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses. R. S. O. 1887, c. 55, s. 2.

"3. No party to an action or proceeding, in any court, shall replevy or take out of the custody of the sheriff, bailiff, or other officer, any personal property seized by him under process against such party. R. S. O. 1887, c. 55, s. 3.

REPLEVIN IN DIVISION COURTS.

"5. (1) In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$60, and in case the title to land is not brought in question, the action may be brought in the Division Court for the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained.

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"(2) The matter shall then be disposed of without formal pleadings, and the powers of 'he courts and officers, and the proceedings generally shall be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts." R. S. O. 1887, c. 55, s. 5.

Formerly, the question of title to land did not oust the jurisdiction in replevin (see Fordham v. Akers, 4 B. & S. 578), but it now excludes jurisdiction in such cases: see notes to sec. 69, sub-sec. 4.

In replevin, a verdict or judgment is divisible, so that the plaintiff may recover for whatever part of the goods he is entitled to and the defendant for the rest: Sills v. Hunt, 16 U. C. R. 521; Haggart v. Kernahan, 17 U. C. R. 341; Henderson v. Sills 8 C. P. 68; Canniff v. Bogart, 6 U. C. L. J. 59; Roscoe's N. P. 1070.

Notice of action is not necessary in replevin: Lewis v. Teale, 32 U. C. R. 108; Folger v. Minton, 10 U. C. R. 423; Manson v. Gurnett, 2 P. R. 389; Gay v. Matthews, 4 B. & S. 436.

Whether there has been a taking or detention is a matter of defence at the trial: Gilchist v. Conger, 11 U. C. R. 197.

Wherever trespass is maintainable, so also is the action of replevin: Cook v. Fowler, 12 U. C. R. 568; Brown v. Zimmerman, 15 U. C. R. 568,

If neither trespass nor trover would be maintainable neither would replevin: Caron v. Graham, 18 U. C. R. 315; Schaffer v. Dumble, 5 O. R. 716; except in those cases where it would be maintainable at common law: 1b.

Replevin will not lie for a chattel seized by a collector of customs for breach of the revenue laws, and a writ issued therefor will be set aside: Scott v. McRae, 3 P. R. 16.

Notwithstanding the provisions of the Municipal Act, which prevent actions being brought for anything done under a by-law until such bylaw has been quashed, such Act applies only to suits for the recovery of damages not to actions of replevin: Wilson v. The Corp. of Middlesex, 18 U. C. R. 348.

In order to maintain the action against a lien-holder, the lien must first be discharged or an offer or tender of the amount of the lien made: Lake v. Biggar, 11 C. P. 170; McMillan v. Byers, 15 S. C. R. 194.

Any person out of whose possession books, etc., have been taken whether by force or fraud or without right, may replevy under our statute, but when the right to the custody and possession depends on the holding of an office, it should appear that the applicant holds the office and is therefore entitled to such books, etc.: Hammond v. McLay, 10 U. C. L. J. 269; and replevin will lie though there has been no wrongful taking, but a detention merely, for every detention is a new taking: Deal v. Potter, 26 U. C. R. 578.

In replevin against one person, goods cannot be taken out of the peaceable possession of another without notice or demand: G. W. Ry, Co. v. McEwan, 28 U. C. R. 528; Hoorigan v. Driscoll, 8 P. R. 184.

A person in possession of goods may have no right against the true owner, yet may have a right to maintain replevin against a wrong-doer: Gilmour v. Buck, 24 C. P. 187.

One who is entitled to possession as agent of a foreign corporation, the owner of it, is entitled to maintain replevin in his own name: Coquillard v. Hunter, 36 U. C. R. 316.

Where an action of replevin is brought on the ground that the facts would sustain an action of trover, the fact of conversion must be clearly established: Smalley v. Gallagher, 26 C. P. 531.

A stranger whose goods have been distrained for rent on the premises of a tenant, cannot in replevin, any more than the tenant, question the landlord's right to demise: Smith v. Aubrey, 7 U. C. R. 90.

Replevin may be brought upon a distress for school rates, and notice of action is not necessary therefor: Applegarth v. Graham, 7 C. P. 171; Spry v. McKenzie, 18 U. C. R. 161; see also Gillies v. Wood, 13 U. C. R. 357; Haacke v. Marr, 8 C. P. 441. But where some of the rates were collectable, others not, the rates legally collectable must be first paid: Corbett v. Johnston, 11 C. P. 317. See also Anglin v. Minis, 18 C. P. at p. 174, per A. Wilson, J. The legal rates must separately appear on the collector's roll, however, to justify the distress: Hurrell v. Wink, 8 Taunt. 369; Sibbald v. Roderick, 11 A. & E. 38; Coleman v. Kerr, 27 U. C. R. 13; Squire v. Mooney, 30 U. C. R. 531; Victoria M. F. Ins. Co. v. Thomson, 9 A. R. 620.

In replevin for goods seized as a distress for taxes, it must distinctly appear that such goods are liable to distress in order to justify the seizure: Sargant v. City of Toronto, 12 C. P. 185.

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Where goods are sold so that the property in them vests in the purchaser, and the vendor refuses to deliver, replevin by the purchaser will lie: O'Rourke v. Lee, 18 U. C. R. 609.

A bailiff cannot, when a claim is made by a third person, sell goods seized under execution and issue an interpleader for the proceeds. Replevin may be maintained by the claimant against the purchaser of the goods: Reid v. McDonald, 26 C. P. 147; but if claim is made to the proceeds he may interplead therefor: *Ib.* p. 163.

Where neither possession nor property in a chattel has passed, a purchaser cannot maintain replevin; Bloxam v. Sanders, 4 B & C. 941; Henry v. Cook, 8 C. P. 29, nor if there is not a contract within the Statute of Frauds: Kaitling v. Parkin, 23 C. P. 569.

Where a chattel is hired, and possession given on the terms of certain monthly payments being made, and on such being made the chattel is to become the property of the person to whom it is hired, the hirer can, in default of payment of the instalments, maintain replevin for the chattel: Mason v. Johnson, 27 C. P. 208. See also, Nordheimer v. Robinson, 2 A. R. 305; Walker v. Hyman, 1 A. R. 345; McDonald v. Forrestal, 29 Gr. 300; 9 S. C. R. 12; Weeks v. Lalor, 8 C. P. 239; Bush v. Fry, 15 O. R. 122; but a demand should first be made therefor: Tuffts v. Mottashed, 29 C. P. 539.

In Arnold v. Higgins, 11 U. C. R. 191, it was held that goods seized under an attachment from the Division Court might be replevied in a Superior Court by a third party claiming them as his own, and so he would appear to have the right to do yet, as the attachment is not against him: R. S. O. c. 55, s. 3. See Jameson v. Kerr, 6 P. R. 3; Anderson v. McEwan, 8 C. P. 532; Barclay v. Sutton, 7 P. R. 14.

Where the goods of A. having been seized by the sheriff under an execution against D. had been handed over by the sheriff to an assignee towhom B. had made a voluntary assignment in insolvency, it was held that A. might maintain replevin against the assignee: Burke v. McWhirter, 35 U. C. R. 1.

During the Insolvent Act it was held that goods could be replevied out of the hands of the guardian in insolvency: Jameson v. Kerr, 6-P. R. 3, but that goods in the hands of an official assignee could not be: Barclay v. Sutton, 7 P. R. 14. See also, Campbell v. Lepan, 21 C. P. 363.

A person agreed to manage a farm in consideration of his getting among other things, one-third of the increase of the young stock. On the death of the owner the farm manager sold all the stock, and it was held that he had no right to do so, and replevin might be maintained by the administratrix of the owner against the purchaser: Duffill v. Erwin, 18 U. C. R, 431.

The taking of property under one writ of replevin does not prevent the operation of a second writ upon the same property: Crawford v. Thomas, (Sheriff), 7 C. P. 63; provided the plaintiff is not the party against whom the first writ issued: C. R. 1104.

Although there may be moneys due on settlement of accounts between workman and employer, the latter can maintain replevin against the former for the goods on which the work is done; Bush v. Pimlott, 9 C. P. 54.

Goods stolen or found, or bought from someone who had no authority to sell, may be replevied by the true owner, no matter where found, and it is of no consequence that they have been sold at public sale: Mackinley McGregor, 3 Whar. 396; Buffington v. Gerrish, 15 Mass. 156; Rowley v. Bigelow, 12 Pick. 307; or transferred to an assignee for the benefit

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If the vendor has no title, the purchaser can have none and the true owner can replevy: Kerby v. Cahill, 6 O. S. 510; Lecky v. McDermott, 8 S. & R. 500; Cundy v. Lindsay, 2 Q. B. D. 96; 3 App. Cas. 459.

If a man borrow a chattel and sell it, the owner can replevy against the buyer or anyone else: Roland v. Gundy, 5 Ohio, 202.

In Ontario there is no market overt and a purchaser cannot, as in England, acquire title by purchase in a public market as against the owner: see Hargrave v. Spink, (1892) 1 Q. B. 25.

Articles carried about the person of the defendant, or worn by him, cannot, while so worn or carried, be taken from him under the writ of replevin: Sunbolf v. Alford, 3 M. & W. 253, 254; Moxham v. Day, 16 Gray, 203, 220.

Goods obtained by fraud or by purchase or on a preconceived design not to pay for them can be replevied by the vendor: Higgins v. Barton, 26 L. J. Ex. 342; Kingsford v. Merry, 11 Ex. 577; Clough v. L. & N. W. Ry. Co., L. R. 7 Ex. 26; Cundy v. Lindsay, 3 App. Cas. 459; 22 Cent. L. J. 537; McCullis v. Allen, 57 Vt. 505; 18 Cent. L. J. 408; but an innocent purchaser from the fraudulent vendee would be protected: White v. Garden, 10 C. B. 919; Stoeser v. Springer, 7 A. R. 497; unless the party were convicted of false pretences: R. S. C. c. 174, s. 250; Bently v. Vilmont, 12 App. Cas. 471. Replevin will lie for a swarm of bees: R. S. O. c. 98; and for money in a box, or leather made into shoes, if sufficiently identified, and for the increase of animals, though the increase were after the taking; but not for animals feræ naturæ and unclaimed: Morris, 101; also for a ship and for sails: Marsh. 110; Prideaux v. Warne, Sir T. Raym. 132; and for a vessel acquired under proceedings in rem in a foreign Admiralty Court: Van Every v. Grant, 21 U. C. R. 542; Castrique v. Imrie, L. R. 4 H. L. 414.

All part owners must join in a replevin suit, nor can a tenant-incommon, nor a joint-tenant, nor a partner bring replevin against a cotenant or partner for taking the common property: McNabb v. Howland, 11 C. P. 484; Ecclestone v. Jarvis, 1 U. C. R. 370.

Replevin can be maintained for leases or other title deeds: Burr v. Munro, 6 O. S. 57; Anderson v. Hamilton, 4 U. C. R. 372; Dowling v. Miller, 9 U. C. R. 227; and for goods distrained off the premises: Huskinson v. Lawrence, 26 U. C. R. 570.

A mere servant of the owner cannot bring replevin: nor one who never had any lawful possession: Cool v. Mulligan, 13 U. C. R. 613.

Growing timber sold and cut into logs may be replevied by the purchaser as against the owner of the land: McGregor v. McNeil, 32 C. P. 538.

Proceedings in replevin.—There is no express rule providing what steps must be taken to secure the issue of a summons in replevin. The sections of R. S. O. 1977, c. 53, respecting procedure were repealed on the Revision of the Statutes in 1887. A course of procedure was adopted for the High Court and County Courts by the Consolidated Rules, but these are not applicable to Division Courts. It is submitted that an order-should be obtained at any rate in all cases where delay would not be fatal, and that an affidavit (form 18) should, in all cases, be made. No other action can be combined with an action of replevin: Rule 41, but, nevertheless, the plaintiff must recover in the replevin action all consequential damage in respect of the goods in question therein: Gibbs v. Cruickshank, L. R. 8 C. P. 454; Rules 18 and 41-50, inclusive, shew the course

of the action after the summons is issued. The defendant may, by paying damages and costs into court, and consenting to delivery up of the bond, and waiving all right to property, obtain a discontinuance of the action.

The affidavit, when not made by plaintiff himself, should describe the deponent as servant or agent of the plaintiff, and would not be good if described as "now acting for the said plaintiff": Arnold v. Hamilton, 1 P. R. 263. The affidavit should be sufficient to enable the sheriff or bailiff to identify the property and if insufficient for that purpose, the writ may be set aside: Jones v. Cook, 2 P. R. 396.

Sheriffs and bailiffs should observe the necessity for their making a proper return of the writ: Carveth v. Greenwood, 3 P. R. 175.

It is a good return to say the cattle are dead, or the goods destroyed by fire: Morris, 115.

Replevin should not, in Division Courts, be joined with any other form of action: G. W. Ry. Co. v. Chadwick, 3 U. C. L. J. 29.

In an action against a bailiff a denial of the taking would generally raise all his defence: Calcutt v. Ruttan, 13 U. C. R. 146: Clarke v. Ruttan, 6 C. P. 97.

Where an action is brought for the detention of the goods only, the claim should be framed as in detinue: Stephens v. Cousins, 16 U. C. R. 329; but a lien cannot be given in evidence under a plea denying the plaintiff's property: *Ib*.

Property described as "two hundred and thirty sheep and lambs" is not sufficiently described: Hoorigan v. Driscoll, 8 P. R. 184.

The writ in the Division Court may be served in the same way as an ordinary summons in that Court after the property is replevied: Rules 47, 48.

A bailiff would be liable for not executing the writ: Boys v. Smith, 9 C. P. 27.

In regulating the fees on issuing a summons in replevin the value of the goods will be determined by the amount sworn to in the affidavit for Judge's order.

The plaintiff may recover as damages the value of any of the property in defendant's hands at the time of issuing the writ to which the plaintiff proves his right, though not actually replevied: Lewis v. Teale, 32 U. C. R. 108; see also Burn v. Blecher, 14 C. P. 415; Bletcher v. Burn, 24 U. C. R. 259; Patterson v. Fuller, 32 U. C. R. 240.

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Replevin can be maintained against a wrong-doer by one who has a bare possession: Gilmour v. Buck, 24 C. P. 187; Meyerstein v. Barber, L. R. 2 C. P. 661; L. R. 4 H. L. 317.

The same evidence, as in trover, of demand is necessary in replevin for the same cause: Smalley v. Gallagher, 26 C. P. 531.

The proceeding of certiorari does not apply to replevin: Mungean v. Wheatley, 6 Ex. 88.

In replevin growing crops may be considered as goods and chattels under the statute 11 Geo. II., c. 19, s. 23; Glover v. Coles, 7 Moore, 231; 1 Bing. 6.

Where one party wrongfully intermingles his property with that of another, all the party whose property is intermingled can require is that he should be permitted to take from the whole an equivalent in number and quality for that which he originally possessed: McDonald v. Lane, 7 S. C. R. 462.

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Where a bailiff seizes goods under a replevin and does not take the Section necessary bond, the seizure will be set aside with costs to be paid by the bailiff: Lawless v. Radford, 9 P. R. 33. See Bates v. Mackey, 1 O. R. 34.

Sheep which were impounded were grazing upon an open common with the consent of the owner thereof, and were being herded by a boy in charge of them with a view of driving them home, when they were taken possession of by two constables against the boy's remonstrance. Held, that the sheep were not running at large in contravention of a by-law of the municipality on the subject, and that the constables were liable in replevin for impounding them. It was held, also, that replevin would not lie against a pound-keeper: Ibbottson v. Henry, 8

Where replevin is brought and the taking is justified for rent alleged. to be due, the landlord must justify the seizure for rent due for the premises on which the seizure was made: Robins v. Coffee, 9 O. R. 332.

In an action of replevin brought in the County Court of Haldimand for a mare taken by the defendants from the defendants' place in that county, removed to the county of Brant, and there detained until replevied. Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on the charge of stealing the mare, and although the original taking was justified under a search warrant issued to search the plaintiff's premises in Haldimand for the mare, and to bring it before a Justice of the Peace for that county, yet the subsequent removal to the county of Brant and the detention there were not justified, and constituted the defendant a trespasser ab initio, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant: Hoover v. Craig, 12 A. R. 72.

The right of trial by jury is now extended to actions of replevin, where the value of the goods sought to be recovered, exceeds \$20. See section 154.

Where in an action of replevin to recover certain goods under a bill of sale, the Judge found for the defendant on the ground that the bill of sale was given in contemplation of insolvency, and was an unjust preference, having the effect of injuring, obstructing and delaying creditors. The decision of the Judge being borne out by the circumstances of the insolvency, and the relationship existing between the parties, and the Judge having had the further advantage of hearing and seeing the witnesses, the court refused to disturb the finding: Pineo v. Gavaza, 8 C. L. T. 400.

It was held in this case that goods seized under a distress warrant for non-payment of a fine imposed by a conviction, are not repleviable by the person against whom the distress issued, unless the magistrate who issued it acted without jurisdiction: Hannigan v. Burgess, 8 C. L. T. 192.

Where in an action of replevin, the writ was directed to a sheriff who was the sole liquidator of the plaintiffs, and as such instituted the action. Held, that this was at most an irregularity, and it was too late for the defendant to raise the objection after appearance.

C. R. 1101 applies to the case of an application on the merits and not for irregularity only.

Quære, whether, even if taken in time, the objection should have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin as to the position of the liquidator as a mere officer under the Act: Alpha Oil Co. v. Donnelly, 12 P. R. 515.

Where goods levied on under execution are replevied by the grantee of the judgment debtor under a bill of sale, the sheriff may put in a claim of special property: Lyman v. Sheriff, 9 C. L. T. 289.

Where goods are illegally seized under an execution, but are not taken out of the actual possession of the owner, he can only recover nominal damages in an action of replevin for them: McLeod v. Sandall, 9 C. L. T. 65, 66; 26 N. B. Reps. 526.

Writ of replevin issued with blanks for defendants' name. No waiver by putting in claim of property: Miller's Tanning Extract Co. v. Horton, 27 N. B. Reps. 54.

As to statement in writ of the value of goods replevied.—Jurisdiction: see Dunlap v. Babany, 27 N. S. Reps. 549.

As to replevin for goods seized for distress under illegal conviction. Action against constable and inspector who directed issue of distress warrant.—Parties.—Notice of action: see Wilson v. Reid, 21 N. S. Reps. 318.

The court has always power, which it will exercise, to stay proceedings on a replevin bond, whenever it would be equitable and just to do so: Bates v. Mackey, 1 O. R. 34; see also Ruttan v. Short, 12 U. C. R. 485; Hedley v. Closter, 13 U. C. R. 333; Culham v. Love, 30 U. C. R. 410.

There may be more than two sureties in the bond, even where the statute says there may be two: Meyers v. Maybee, 10 U. C. R. 200; Bacon v. Langton, 9 C. P. 410; Becker v. Ball, 18 U. C. R. 192; Bates v. Mackey, 1 O. R. 34.

The assignee of the bond may sue it in his own name: Bacon v. Langton, 9 C. P. 410.

The bond may be attested by only one witness, but a subscribing witness is necessary to its validity: Heley v. Cousins, 34 U. C. R. 63.

If a bailiff wrongfully refuse to assign the bond, an action would lie against him: Pacaud v. McEwan, 31 U. C. R. 328.

The bond cannot be assigned while suit pending: Becker v. Ball, 18 U. C. R. 192.

The bond is forfeited and assignable when the court in which replevin suit was brought refused to try the case for want of jurisdiction: Welsh v. O'Brien, 28 U. C. R. 405.

Where the defendant succeeds on the pleas of non detinet, and not guilty, he is entitled to an assignment of the bond and to maintain an action for his costs of defence: Mulvaney v. Hopkins, 18 U. C. R. 174.

Where the writ and subsequent proceedings are set aside by Judge's order, the defendant has still a right to take the benefit of the bond: Meloche v. Reaume, 34 U. C. R. 606.

If a plaintiff prosecutes his suit without delay there is no action on the bond: Caswell v. Catton, 9 U. C. R. 282, but the inability of the plaintiff's solicitor to communicate with his client, does not prevent a forfeiture of the bond: Bletcher v. Burn, 24 U. C. R. 124.

If the plaintiff does not prosecute his suit with effect and without delay the defendant may take an assignment of the bond from the bailiff and sue on it in his own name: Becker v. Ball, 18 U. C. R. 192; Welsh v. O'Brien, 28 U. C. R. 405; Mulvaney v. Hopkins, 18 U. C. R. 174; Johnson v. Parke, 12 C. P. 179; Meloche v. Reaume, 34 U. C. R. 606; Culham v. Love, 30 U. C. R. 410; Caswell v. Catton, 9 U. C. R. 282, 462; Bletcher v. Burn, 24 U. C. R. 259; Meyers v. Baker, 26 U. C. R. 16; Golding v. Bellnap, 26 U. C. R. 163; Patterson v. Fuller, 31 U. C. R. 323; McKelvey v. McLean, 34 U. C. R. 635.

It is no answer to an action on the bond, for not prosecuting the suit Section with effect and making return of the goods, to say that a return was made according to the condition, but the plaintiff refused to accept the same. It only answers one breach: Golding v. Bellnap, 26 U. C. R. 163: see Kennin v. Macdonald, 12 C. L. T. 440,

Where a plaintiff succeeds only for part of the goods replevied, and a return is adjudged of the rest, he is liable upon the bond for not proseouting the suit with effect as to the goods for which he failed, and for not returning them: Patterson v. Fuller, 31 U. C. R. 323.

A set-off may be pleaded to an action by the assignee of the bond: McKelvey v. McLean, 34 U. C. R. 635.

Also payment into court: Thompson v. Kaye, 13 C. P. 251.

A replevin bond taken in a Division Court suit, can be sued in that court no matter what the penalty of the bond may be; but judgment cannot be for an amount beyond the penalty in the bond: section 266; Exchange Bank v. Springer, 13 A. R. 390.

An action would lie against a bailiff for taking an insufficient bond in replevin: Norman v. Hope, 13 O. R. 556, but the amount of the damages could not exceed the penalty of the bond: Idem. See also Jeffery v. Bastard, 4 A. & E. 823.

A bond in replevin, though irregular as taken to the Judge, may be good as a voluntary bond: Stansfeld v. Hellawell, 7 Ex. 373.

A bailiff is bound to inquire into the sufficiency of the pledges or sureties in a replevin bond: Hindle v. Blades, 5 Taunt. 225; Norman v. Hope, 14 O. R. 287.

The actual damage is all plaintiff is entitled to recover on the bond: Heley v. Cousins, 34 U. C. R. 63.

Courts are averse to staying proceedings on replevin bonds, and prefer leaving the question of damages to be tried in the ordinary way: Hoover v. Zavitz, T. T. 1 & 2 Vic.; Culham v. Love, and Love v. Culham, 30 U. C. R. 410; Meyers v. Baker, Hargreaves v. Meyers, 26 U. C. R. 16; Meloche v. Reaume, 34 U. C. R. 606; Johnson v. Parke, 12 C. P. 179.

A release by plaintiff to one of several obligors in a replevin bond to a bailiff, after an assignment by him to the plaintiff in replevin, would release all the sureties, and would also preclude him from suing the bailiff for taking insufficient sureties: Kirkendall v. Thomas, 7 U. C. R. 30.

So a reference to arbitration of the replevin suit, without the assent of the surety, will discharge him: Archer v. Hale, 4 Bing. 464; Hutt v. Gilleland, Hutt v. Keith, 1 U. C. R. 540. But it is otherwise if the surety

Enlarging time for making award does not discharge the sureties: Aldridge v. Harper, 10 Bing. 118.

A postponement of the trial of a replevin suit, without the direct assent or concurrence of the sureties, discharges them; the question being, not whether the sureties are injured by the delay, but whether they might have been: Canniff v. Bogart, 6 C. P. 474.

Nor will the attendance of the sureties at an arbitration imply consent to the reference: Burke v. Glover, 21 U. C. R. 294: See 10 U. C. L. J. 169.

An informal bond would be enforceable by the bailiff as a voluntary bond and he would stand as a trustee for the defendant: Stansfield v. Hellawell, 7 Ex. 373.

The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond and the costs of the suit on the bond: Hefford v. Alger, 1 Taunt. 218.

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Sections 72-73 In replevin for distress for rent, the sureties are only liable for the value of the goods seized; and if the value exceeds the rent due, they will be only liable for the rent: Hunt v. Round, 2 Dowl. 558.

As to liability of landlord for the acts of his bailiff, see Howells v. Listowell Rink Co., 13 O. R. 476.

Powers of

73. Every Division Court shall as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, including the power to relieve against penalties, forfeitures and agreements for liquidated damages, and shall in every such proceedings give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court. 44 V. c. 5, s. 77; 49 V. c. 16, s. 38.

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By The Judicature Act, R. S. O. c. 44, s. 53, s-s. 8, it is enacted:

Injunctions and receivers. "A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the court, in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim or title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable."

By section 52, sub-section 3 of the same Act, it is enacted that:

Relief against penalties, etc.

"(Subject to appeal as in other cases) the High Court shall have power to relieve against all penalties, forfeitures and agreements for liquidated damages, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as the court thinks fit."

Equitable

And by section 52, sub-section 6, that:

"If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by ay of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been

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Section 52, sub-section 7:

"The said courts respectively, and every Judge thereof shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

Section 52, sub-section 8:

"The said courts respectively, and every Judge thereof shall recognize and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.'

Section 52, sub-section 10.

"If any action is brought in the High Court for any cause of action Stay of for which any suit or action has been brought and is pending between ingsif the same parties or their representatives in any place or country out of action for Ontario, the court or any Judge thereof may make an order to stay all same cause proceedings in the High Court until satisfactory proof is offered to the is pending court or Judge, that the suit or action so brought in such other place or Ontario, country out of Ontario is determined or discontinued."

Section 52, sub-section 11.

"Subject to the aforesaid provisions for giving effect to equitable Giving rights and other matters of equity in manner aforesaid, and the other effect to express provisions of this Act, the said courts respectively, and every claims. Judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations, and liabilities existing by the common law or created by any statute, in the same manner as the same would have been recognized and given effect to, prior to The Ontario Judicature Act, 1881, by any of the courts then existing and whose jurisdiction is now vested in the High Court."

Section 53, sub-section 6.

"Stipulations in contracts, as to time or otherwise, which would not Stipulabefore the passing of The Ontario Judicature Act, 1881, have been tions not deemed to be or to have become of the essence of such contracts in a of the Court of Equity, shall receive in all courts the same construction and contracts. effect as they would, prior to the passing of said Act, have received in equity."

Division Courts may grant injunctions and commit for disobedience thereto.—These sections are all introduced and practically form part of the Division Courts Act by the above section. In Ex parte Martin, 4 Q. B. D. 212; S. C. sub nom. Martin v. Bannister, 4 Q. B. D. 491, which was an action, in the Warwickshire County Court for damages for a nuisance, it was held, that the section gave to an inferior court, having no larger jurisdiction in this respect than our Division Courts, power to grant an injunction and to commit for discbedience thereof. Kelly, C.B., said: "In the present case there was a cause of action for a nuisance and judgment for the plaintiff thereon, and as incidental to that it is essential that the court should have power to grant an injunction. What reason is there why the County Court should not have the like power as the High Court under section 89, which gives to every inferior court the same power to grant such remedy 'or combination of remedies,' in as full and ample a manner as might and ought to be done by the High Court? I can see no reason why it should not. * * * I think it is only reasonable to interpret the words of section 89 to mean that a County Court has the same power to commit for disobedience of an injunction as the High Court has.

On appeal, Bramwell, L.J., said: "If there has been actual damage there is but one cause of action for which there are two remedies: damages and an injunction. The County Court then has power to entertain a claim for damages and at the same time for an injunction to prevent a repetition of the injury. * * * It is said that an attachment is not part of the remedy given by the court, but a punishment inflicted for disobedience to an injunction, but that is really not so; it is part of the remedy which consists of an injunction and consequent attachment. The remedy is, in fact, an injunction enforceable by attachment."

Brett, L.J., said: "As the attachment is part of the redress the County Court has a right not only to grant an injunction but to enforce it by attachment."

Cotton, L.J., said: "I think that the County Court has power to enforce its injunctions by attachment. The power is given by section 89, and must be exercised in the manner and form pointed out by the County Court Rules."

May commit in all cases for disobedience of its orders.—In Richards v. Cullerne, 7 Q. B. D. 623, the right to commit under this section was held to extend to all orders, whether final or interlocutory. Jessel, M.R., said: "The section applies in every case where, if the action were in the High Court, a party could be committed for disobedience." Brett, L.J., said: "The County Court then has the same power as the High Court at every stage."

A person who obtains a judgment or order in the Division Court is entitled, therefore, to the same redress and remedies, or combination of remedies, as if the judgment or order had been given or made in the High Court.

Equitable Execution.—A receiver could be appointed by way of equitable execution. The County Court of Lincolnshire appointed a receiver of moneys, which no court had the right to reach by equitable execution, and prohibition was therefore granted. The court, however, did not cast any doubt upon the jurisdiction to appoint a receiver in a proper case. The English County Courts have no greater right to appoint a receiver than the Division Courts: R. v. Judge Lincolnshire County Court, 20 Q. B. D. 167.

Sequestration.—The Division Courts would also have power to order the issue of a writ of sequestration. For instance, in an action of detinue it might order the return of the goods, and upon disobedience of the order the plaintiff might proceed by writ of delivery, attachment or section sequestration: Ivory v. Cruickshank, W. N. (1875) 249.

Attachment.—The authorities cited under Injunctions show clearly the court's power to enforce its orders by attachment.

Speaking generally, it may be said that in all actions for damages or debt within the prescribed limits, the Division Courts are now equipped, not only with the powers of the Common Law Courts, but also with all the powers which the Court of Chancery, in its concurrent jurisdiction, possessed; and also with all the powers, upon and since the fusion of law and equity, which have been conferred upon the successor of these courts. The effect of this has, in a large measure, yet to be disclosed.

Relief against penalties, forfeitures or agreements by way of liquidated damages.—The right of a Division Court to relieve against penalties, etc., was first given in 1886. It was then given subject to appeal. Upon the revision of the statutes this restriction disappeared, and the right to appeal is governed only, as in other cases, by sec. 148 and by 52 Vic. c. 31, s. 3. The power to relieve against agreements for unliquidated damages was not possessed by any court prior to the statute of 1886. 49 Vic. c. 16, s. 38.

Courts practically have power under these provisions to disregard all contracts and to adjudge that in no case shall a penalty, forfeiture or agreement fixing damages be enforced, except to the extent of actual damage sustained. The distinction between penalties and unliquidated damages may, generally speaking, be said therefore to have been swept away.

Defence and counter-claim.—Every kind of defence, legal or equitable, including a counter-claim, may also be set up in answer to an action in a Division Court. An absolute right is given to the defendant to insist upon his defence and counter-claim whether the same involves title to land or other matter beyond the jurisdiction of the court: see notes to section 74.

Procedure.—Only the abstract rights and powers of the High Court are conferred. "The power given to the inferior court is that in any action before such court it may give the same relief, redress or remedy which would be given in a similar action in the Superior Court. It gives to the inferior court authority to grant the same relief, redress or remedy as the result of the action, but it does not give such court the same power, as the Judges of the Superior Court have, to arrive at the granting of such relief, redress or remedy: per Brett, M.R., 10 Q.B. D. 508, The rules of the High Court are not, therefore, applicable to Division Courts. These courts must proceed with their own machinery and under rules formed by the Board of County Judges, except that the "principles of practice" of the High Court may be applied under section 304.

In Pryor v. City Offices Co., 10 Q. B. D. 504 (April 5th, '83), it was held that the Judge of an inferior court had not the power of the High Court, on a motion for a new trial, to direct judgment for either party, the inferior court having no such express power as is conferred upon our Division Courts by section 146.

In Building & Loan Assn. v. Heimrod, 19 L. J. N. S. 254, 1883, it was held that a non-suit had not the effect of preventing the plaintiff from bringing a fresh action, notwithstanding the rule of the High Court giving that effect to such a judgment in High Court cases. Bank of Ottawa v. McLaughlin, 8 A. R. 543, 1883, is to the same effect. "The Rule of the High Court is a rule of procedure applying only to the courts to which it is in terms made applicable:" Per Spragge, C.J.O., Clarke v. McDonald, 4 O. R. 310 (1883), held, that the Rules of the High Court as

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to service of partners did not apply to Division Courts: see also Guy v. G. T. R. Co., 10 P. R. 874. In two Division Courts the Rules of the High Court authorizing speedy judgment were acted upon, but it may be doubted, in view of the careful analysis the section has undergone in the English Court of Appeal, whether these cases were correctly decided: Smith v. Lawlor, 19 L. J. N. S. 258 (1883); Conners v. Birmingham, 20 L. J. N. S. 10 (1884). See also Willing v. Elliott, 37 U. C. R. 320 (1876), where it was held that the procedure of the High Court as to discovery was not applicable to Division Courts.

Injunctions.—The cases in which Division Courts have jurisdiction, in respect of which an injunction may be said to be part of the remedy, are those in which it is desired to restrain the defendant from the repetition or continuation of any breach of contract or wrongful acc, or from the commission of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. In these cases the Superior Courts of Law had jurisdiction even before the enactment of The Judicature Act: R. S. O. 1877, c. 53, s. 30.

These cases may be said to comprise injunctions against waste, trespass, nuisance, and breach of contract, and also suits against executors, clubs or societies where some wrongful act has been or is about to be committed by them which will prejudicially affect some right in respect of which the plaintiff has sued in a Division Court.

Where there is a legal right capable of being enforced, the court may interfere, without being hampered by old rules, in protection of that right: North London Railway Co. v. Great Northern Railway Co. 11 Q. B. D. 30 at p. 39; G. T. Railway Co. v. Credit Valley Railway Co. 26 Gr. 572. It is not competent to grant an injunction to restrain a man from dealing with his property or to practically give execution against property before judgment: Newton v. Newton, 11 P. D. 13; Robinson v. Pickering, 16 Ch. D. 371, 660; Hepburn v. Patton, 26 Gr. 597.

Nor to restrain an arbitration which would be futile: North London Railway Co. v. Great Northern Railway Co., 11 Q. B. D. 30; London & Blackwall Railway Co. v. Cross, 31 Ch. D. 354.

Where a plaintiff recovered \$60 damages for flooding caused by a dam, the court granted an injunction to restrain defendant from continuing the dam so as to pen back the water: McNab v. Taylor, 34 U. C. R. 524. Such proof of possession as is sufficient to maintain trespass, is sufficient to obtain an injunction against waste: Walker v. Friel, 16 Gr. 105. A defendant was restrained from using his steam engine so as to occasion damage or annoyance to the plaintiff from smoke: Cartwright v. Gray, 12 Gr. 399; but acquiescence would be a good defence: Heenan v. Dewar, 18 Gr. 438. Ordinarily a court will not grant an injunction to protect the possession of chattels unless they are of peculiar value: Geddes v. Morley, 1 O. S. 323, but see Wilmot v. Maitland, 2 Gr. 556. Sawlogs may be of peculiar value: Flint v. Corby, 4 Gr. 45; Fuller v. Richmond, 2 Gr. 24. If any fiduciary relation exists between the parties an injunction will be granted: Wood v. Roweliffe, 3 Hare, 306; or if it be necessary to protect the property in specie to prevent the plaintiff from losing his right: Laughton v. Thompson, 7 Gr. 30; Merchant's Express Co. v. Morton, 15 Gr. 274. The courts cannot entertain jurisdiction in the case of covenants or agreements for personal services, including duties of a personal and confidential character: Kerr on Injunctions, 429. Where, however, a contract of personal service is entered into and contains an engagement not to serve any other master, the court can lay hold of that and restrain him from so doing: Lumley v. Wagner, 1 D. M. & G. 604; and a contract to give "the whole of his time to his master's business" in the absence of any negative stipulation in that Guy v. of the nav be in the ecided: am, 20 (1876),

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behalf, will not entitle the master to an injunction to restrain the servant Section from giving part of his time to a rival of the master: Whitwood Chemical Co. v. Hardman, (1891), 2 Ch. 416.

No action will lie against an apprentice for breach of an apprenticeship deed made while he was under age, and therefore notwithstanding negative stipulations therein, the court will not restrain a third person from employing the apprentice, nor the apprentice himself from being employed: De Francesco v. Barnum, 43 Ch. D. 165; 45 Ch. D. 430. An injunction restraining a distress should only be granted on condition that the rent be paid into court: Shaw v. Jersey, 4 C. P. D. 120. Pending the trial of the right it may be protected from irreparable, or at all events from serious damage, by an interim injunction: Kerr on Inj. 11. All that is required is that the injury would be a grievous one, or at least a material one, and not adequately reparable by damages: Ib. 14.

In doubtful cases where damage may be occasioned to the defendant by an interim injunction the court will require the plaintiff to enter into an undertaking to abide by any order it may make as to This should always be required when the order is made exparte: Graham v. Campbell, 7 Ch. D. 490. If the plaintiff is out of the jurisdiction, or is a limited company, the undertaking of some responsible person should be given: Kerr, 627. The undertaking ought not to be confined to the persons restrained, but should apply to all the defendants: Tucker v. New Brunswick, etc., Co., 44 Ch. D. 249. Upon the injunction being dissolved the court may assess the damages or order a reference: see Leading Article, 12 C. L. T. 225; but is not bound to do so: Gault v. Murray, 21 O. R. 458. The allowance of damages is in the discretion of the court: Featherstone v. Smith, 20 Gr. 474; Hessin v. Coppin, 21 Gr. 253; Smith v. Day, 21 Ch. D. 421; but in the later case of Griffith v. Blake, 27 Ch. D. 474, it was said that damages would be granted in all cases where the plaintiff fails on the merits, unless there are special circumstances to the contrary. The inquiry as to damages need not be ordered at the trial: Ross v. Buxton, W. N. (1888) 55. If the defendant dies, his representatives may obtain the damages: Sheppard v. Gilmour, W. N. (1887), 242.

Mandatory injunction.—This is an order that things be restored to their former condition. If damages would be ample compensation, and if great inconvenience would be caused by granting the injunction, it will be refused. But if the restoration of the former condition of things is the only adequate remedy, or if the act complained of is in breach of an express stipulation, the injunction will go no matter how great the inconvenience: Durell v. Pritchard, L. R. 1 Ch. 244; McManus v. Cooke, 35 Ch. D. 687. It will also go when there has been an attempt to anticipate an injunction: Daniel v. Ferguson, (1891), 2 Ch. 27. The court may interfere on interlocutory application, but the right must be practically free from doubt: Toronto Brewing and Malting Co. v. Blake, 2 O. R.

Breach of injunction.—The remedy for breach of an injunction is by attachment for contempt. No breach of the injunction can be committed until the party restrained has notice thereof. He may have notice by being in court when the order is made or by telegraph: Kerr, 641. Notice of motion for committal should be served personally. A person who assists in the breach may be committed though not restrained by the order: Wellesley v. Mornington, 11 Beav. 180; Bickford v. Welland Ry. Co., 17 Gr. 484; Brown v. Sage, 12 Gr. 25. The fact that no damage is done by the breach of the injunction is no answer to the motion to commit: Brown v. Sage, Ib. The court may discharge a party committed for breach of the injunction, upon his explaining and apologising for the contempt. If he is unable to pay the costs, the

court will not make the payment of them a condition of his discharge: Donnelly v. Donnelly, 9 O. R. 678; Roberts v. Dawson, 21 O. R. 585.

Receivers.—A receiver may be appointed to preserve property pending litigation. The more usual class of cases in which, within Division Court jurisdiction, a receiver will be sought will be those where what is called "equitable execution," is desired, "confusion of ideas has arisen from the use of the term 'equitable execution.' The expression tends to error. It has often been used by Judges and occurs in some orders as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from a legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief. which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at Common Law. It cannot be made against the estate which formerly belonged to a dead man, but which, as he is dead, is no longer his, it must be made against his heir or devisee, and under such circumstances that the court has jurisdiction over the heir or devisee:" Per Cotton, L.J., In re Sheppard, Atkins & Sheppard, 48 Ch. D. 135, 136; Kirk v. Burgess, 15 O. R. 608. The application may be made in the same action after judgment: Anglo-Indian Bank v. Davies, 9 Ch. D. 275; Smith v. Cowell, 6 Q. B. D. 75; Salt v. Cooper, 16 Ch. D. 544; McLean v. Allen, 14 P. R. 84; and it is not necessary to show that the money cannot be recovered out of other property, or even that legal execution has issued: Stuart v. Grough, 15 A. R. 299; Kincaid v. Kincaid, 12 P. R. 462. The appointment will only be made where the amount of the judgment justifies the expense, and there is fair reason to suppose there is something to receive: I. v. K., W. N. (1884), 63. If any good end can be served the court will make the appointment: Kirk v. Burgess, 15 O. R. 608. Even if it is undetermined whether anything is due the order may go: McLean v. Bruce, 14 P. R. 190. Trust. moneys not yet due, but which may become due in the future, not being attachable, may be reached by the appointment of a receiver: Webb v. Stenton, 11 Q. B. D. 518; Fuggle v. Bland, 11 Q. B. D. 711 Westhead v. Riley, 25 Ch. D. 413; Archer v. Archer, W. N. (1886), 66, Kincaid v. Reid, 21 L. J. N. S. 144; Stuart v. Grough, 15 A R 299. A right to maintain an action to enforce a covenant to may be made available to a judgment creditor by the receiver: Moot v. Gibson, 21 O. R. 248. Property of a gried woman subject to a restraint on anticipation cannot be reached. Chapman v. Biggs, 11 Q. B. D. 27, Macdonald v. Anderson, 25 L. J. N. S. 220: see-Article "High Court Practice in Inferior Courts," 3 C. L. T. 374.

A receiver cannot be appointed of a fund when it depends on the discretion of trustees whether any sum shall be paid: R. v. Judge County Court of Lincolnshire, 20 Q. B. D. 167; Fisken v. Brooke, 4 A. R. 8. A pension of a retired Indian officer, being rendered inalienable by statute, is not liable to be taken in execution by the appointment of a receiver: Lucas v. Harris, 18 Q. B. D. 127; but commutation money of part of the retired pay might be reached: Crowe v. Price, 22 Q. B. D. 429. Salary not yet earned cannot be reached: Trust and Loan Co. v. Gorsline, 12 P. R. 654. Where the interest of the debtor is reversionary; the receiver is entitled to it when it falls into possession, but the court has no jurisdiction to declare a charge upon the fund, and order an immediate sale: Flegg v. Prentice, (1892), 2 Ch. 428.

Money due to a mortgagee may be reached and the mortgager will be restrained from paying the debt and the mortgage from assigning the mortgage: Parrett v. Lortie, 7 C. L. T. 195. Where a judgment debtor is entitled to a share in the estate of a deceased intestate, to whom no administration has been taken out, a receiver may be granted: Mullane

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v. Ahern, 28 L. R. Ir. 105. The court will not appoint a receiver of a judgment debtor's property in general terms: Hamilton v. Brogden, W. N. (1891), 14. Unascertained and unadjusted insurance moneys can only be reached in Division Courts by means of a receiver: Boyd v. Haynes, 5 P. R. 15; Canada Cotton Co. v. Parmalee, 13 P. R. 26, 808; Simpson v. Chase, 14 P. R. 280. Where there is a legal mode of execution a receiver will not be appointed: Manchester & L. D. Banking Co. v. Parkinson, 22 Q. B. D. 173; Hamilton v. Brogden, W. N. (1891), 36. Where the plaintiff is appointed receiver it is without security and without salary: Kincaid v. Reed, 21 L. J. N. S. 144; Boyle v. Bettws Coll. Co., 2 Ch. D. 726. The plaintiff's solicitor should not be appointed: Re Lloyd, Allen v. Lloyd, 12 Ch. D. 447. Where security is required the receiver has no title till it is perfected: Edwards v. Edwards, 2 Ch. D. 291; but his title then relates back to the date of the order: Ex parte Evans, 13 Ch. D. 252. The order takes the fund into the custody of the law, and no one else than the receiver can lay hands on or interfere with it without the leave of the court: Re Pope, 17 Q. B. D. 743; Stuart v. Grough, 15 A. R. 309; Levasseur v. Mason, (1891), 2 Q. B. 73. "The court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or to be dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous:" Ames v. Birkenhead, 20 Beav. 332; Coleman v. Glanville, 18 Gr. 42; Evelyn v. Lewis, 3 Hare, 472; Russell v. East Anglian Ry. Co., 3 Mac. & G. 104; Defries v. Creed, 13 W. R. 632; Searle v. Choat, 25 Ch. D. 723. Where a receiver was sued by a tenant upon whom he has distrained the action was stayed: Simpson v. Hutchinson, 7 Gr. 308.

The order should ordinarily be made on notice. If made ex parte it should be for a limited time only, and should not award costs: McLean v. Allen, 14 P. R. 84. It should reserve the rights of prior encumbrancers or they may obtain leave to proceed notwithstanding the appointment: Gardner v. Burgess. 13 P. R. 250; Lane v. Capsey, (1891), 3 Ch. 411. The status of the receiver is not that of an assignee, but only that of a chargee or lien-holder upon the fund or property to which the debtor is entitled: Re Morphy, Morphy v. Niven, 11 P. R. 321. He has a right to assert his claims and to bring actions even for administration though he may require, in some instances, the sanction of the court: Ib. Any action by the receiver must be in the name of the debtor: McGuin v. Fretts, 13 O. R. 699; Stuart v. Grough, 14 O. R. 255. The receiver should apply to the debtor to bring the action. If the debtor delays unreasonably in bringing or prosecuting it, or refuses to bring it, the receiver may obtain leave: McLean v. Alien, 14 P. R. 291.

The appointment of a receiver, in itself, operates as an injunction restraining the defendant from getting in money which the receiver is appointed to receive: per Lindley, L.J., Sartoris v. Sartoris, (1892), 1 Ch. 11. The receiver must pass his accounts before the Judge or an officer discreted to pass them. If not appointed without salary, he will be allowed five per cent. or more, according to special circumstances: Kerr on Receivers, 164.

For forms of proceedings see Schedule of forms. See also Truman v. Redgrave, 18 Ch. D. 547; Book v. Ruth, 20 L. J. N. S. 193.

Sequestration.—The remedy by sequestration would be applicable only, in Division Courts, when positive orders of the court, other than for the payment of money, had not been complied with. If for payment of money, it would be in the form of a judgment and the warrant of execution would be the remedy thereon: London & Canadian v. Merritt, 32 C. P. 375. The writ is a means of coercing or compelling obedience to

Section 78

the order of the court by keeping the disobedient party out of his property.

Penalties, Forfeitures and Liquidated Damages.—Since 8 & 9 Wm. III., c. 11, a penalty for payment of a larger sum on non-payment of a smaller, has been irrecoverable.

The contest, since that time, has principally been whether a sum mentioned as payable on non-performance of a contract, was a penalty or a sum payable as liquidated damages.

The following rules have been laid down :--

1. Where any one of the stipulations is for payment of money the court will not sever the stipulations, but will hold the sum to be a penalty: Astley v. Weldon, 2 B. &. P. 346; Kemble v. Farren, 6 Bing. 141; Re Newman, 4 Ch. D. 724.

2. Where one lump sum is made payable by way of compensation on the occurrence of one or all of several events, some serious and some trifling, the sum is a penalty: Elphinstone v. Monkland Iron & Coal Co., 11 App. Cas. 332.

3. But where the sum is payable on a single event only, not being the non-payment of money, or where the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, then though the stipulations may be of varying importance, the amount will be treated as liquidated damages: Wallis v. Smith, 21 Ch. D. 243; Law. v. Local Board of Redditch, (1892), 1 Q. B. 127; see notes to Sloman v. Walter, White & Tudor's L. C. 1257.

4. Where a deposit is to be forfeited for a breach of a number of stipulations, although some may be trifling, the contract of the parties must be carried out: Wallis v. Smith, 21 Ch. D. 258; Howe y. Smith, 27 Ch. D. 89.

As stated above, the courts now have full power to give relief not only against penalties and forfeitures, but also agreements for liquidated damages.

Counter-claim.—"The Judicature Acts did not alter the rights of parties, they only affected procedure. Before these Acts a person having a cross-claim must have raised it by cross-action, but these Acts have given a right to counter-claim. In some of the cases language has been used which would seem to imply that a counter-claim is sometimes in the nature of set-off, and sometimes not. No doubt matter is occasionally pleaded as counter-claim which is really set-off, but counter-claim is really in the nature of a cross-action. The court has determined that where there is a counter-claim, in settling the rights of parties, the claim and counter-claim are, for all purposes, except execution, two independent actions:" per Lord Esher, M. R. Stumore v. Campbell, (1892), 1 Q. B. 316.

A counter-claim must claim relief against the plaintiff and he must be a party to it: Harris v. Gamble, 6 Ch. D. 748; Furness v. Booth, 4 Ch. D. 586; Turner v. Hednesford Gas Co. 3 Ex. D. 145.

When two or more plaintiffs sue for a joint claim, the defendant may set up a separate counter-claim sounding in damages against each or either of them: Manchester S. & L. Ry. Co. v. Brooks, 2 Ex. D. 243.

A defendant can only set up by way of counter-claim or set-off, a demand for which he can bring an action. Therefore, a cause of action which arose out of the jurisdiction, cannot be set up by way of counter-claim or set-off, unless the circumstances be such as to permit of an action being brought upon it: Canadian Bank of Commerce v. Northwood, 8 C. L. T. 356; 5 Man. L. R. 342.

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A claim which the Court of Chancery would, before the Judicature Act, have restrained a defendant from pleading as a set-off, cannot be set up as a counter-claim: Newell v. Nat. Pro. Bank of England, 1 C. P. D. 496.

Where a claim and counter-claim arise out of different matters, so that the counter-claim is really in the nature of a cross-action, the defendant, if he is residing out of the jurisdiction, may be required to give security for the plaintiff's costs of the counter-claim, and if the only dispute remaining arise on the counter-claim it is only right that he should be so required: Sykes v. Sacerdoti, 15 Q. B. D. 423.

A counter-claim need not arise out of the same subject as the cause of action. There can be a counter-claim for an entirely different subject as between the parties to the action themselves: Brown v. Nelson, 11 P. R. 121; McLean v. Hamilton St. Ry. Co., 11 P. R. 193.

A defendant cannot obtain judgment on his counter-claim until the plaintiff's claim is tried: Aitkin v. Dunbar, 45 L. J. Ch. 489; Greer v. Hunter, 11 C. L. T. 281.

A plaintiff cannot discontinue his action after a counter-claim has been delivered so as to prevent defendant from enforcing the cause of action contained in the counter-claim: McGowan v. Middleton, 11 Q. B. D. 464, overruling Vavasseur v. Krupp, 15 Ch. D. 474; but quære, as to an action in the Division Court, if the counter-claim should be beyond the court's jurisdiction?

The courts will give effect to equitable rights, though not set up by way of counter-claim: Mostyn v. West Mostyn Coal and Iron Co., 1 C. P. D. 145; Eyre v. Hughes, 2 Ch. D. 148; Breslauer v. Barwick, 36 L. T. N. S. 52.

Counter-claims have been allowed against assignees of choses in action in the following cases: Claim of breach of same contract: Young v. Kitchin, 3 Ex. D. 127; Exchange Bank v. Stinson, 32 C. P. 158; Government of Newfoundland v. Newfoundland Ry. Co., 13 App. Cas. 199, see page 213, where it is said: "Unliquidated damages may be set off as between the original parties and also against an assignee, if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment. See also Irving v. Morrison, 27 C. P. 242; Henderson v. Brown, 18 Gr. 86; Williams v. Sibley, 4 Giff. 142; Gould v. Close, 21 Gr. 275; Cavendish v. Geaves, 24 Beav. 163; Re West of England and S. W. Dist. Bank. Ex parte Branwhite, 40 L. T. N. S. 652; Re National Alliance Co., Ashworth's Case, 7 L. T. N. S. 64; Greene v. Harris, 7 C. L. T. 391; 16 S. C. R. 714.

In an action for rent, a claim for damages for breach of an implied covenant in the lease, may be set up by way of counter-claim: Mostyn v. West Mostyn Coal & Iron Co., 1 C. P. D. 145.

A person named in a defence as party to a counter-claim cannot counter-claim against the defendant: Street v. Glover, 2 Q. B. D. 498.

It is optional with a defendant to set up a counter-claim, and his not doing so does not bar his right to take any other proceedings: Hindlay v. Haslam, 3 Q. B. D. 481.

A defendant must not bring a third party before the court as defendant to a counter-claim against the plaintiff, unless the relief to be obtained against him relates specifically to, or is connected with the subject matter of the action: Padwick v. Scott, 2 Ch. D. 736.

D.C.A.-7

Section 71 Sections 73-74 In an action on a mortgage given for the balance of purchase moneyof land, defendant may counter-claim setting up fraud in the transaction and seeking a return of the money paid with interest: Lee v. McMahon, 2 O. R. 654; see also Bartholemew v. Rawlings, W. N. (1876) 56.

In an action for wages, the master has the right to counter-claim fordamage sustained by reason of the servant's improperly leaving his employment: Awberry v. McLean, 19 L. J. N. S. 335.

A counter-claim was allowed in respect of short deliveries of cargoesof goods in an action for the price of other goods: Cappeleus v. Brown, W. N. (1875) 231; so also, a set-off of a County Court judgment was allowed in an action on the judgment of the Court of Exchequer: Sandys v. Louis, W. N. (1875) 249.

A counter-claim for damages for breach of an agreement to let, and for specific performance, was allowed to stand in an action for rent:: Atwood v. Miller, W. N. (1876) 11.

Relief against third parties.—Relief may be granted against a third party served with notice of the claim in writing if any rule or order of court is made: see R. S. O. c. 44, s. 52, s.-s. 7. The Consolidated Rules do not apply: see Pryor v. City Offices Co., 10 Q. B. D. 504; Clarke v. Macdonald, 4 O. R. 310; Merchants Bank v. Van Allen, 10 P. R. 348. No Rules have yet been adopted by the Board of County Judges dealing: with third parties.

In the High Court two conditions must be complied with: 1. The relief sought must relate specifically to, or be connected with, the subject matter of the action: Padwick v. Scott, 2 Ch. D. 736; Treleven v. Bray, 1 Ch. D. 176; Barber v. Blaiberg, 19 Ch. D. 473; Quin v. Hession, 40 L. T. N. S. 70. 2. The relief cannot be sought either against a co-defendant or a third person in which the plaintiff is not interested: Treleven v. Bray, 1 Ch. D. 176; Furness v. Booth, 4 Ch. D. 586; Harris v. Gamble, 6 Ch. D. 748; Warren v. Twining, 24 W. R. 536; Evans v. Buck, 4 Ch. D. 432; Dear v. Sworder, 4 Ch. D. 476; McLay v. Sharp, W. N. (1877) 216; Town of Dunnas v. Gilmour, 2 O. R. 463.

It is no objection that the third party could not have been a party tothe plaintiff's original claim: Turner v. Hednesford Gas Co., 3 Ex. D. 145.

74. Where in any proceeding before a Division Courtany defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim. 44 V. c. 5, s. 78.

[As to transfer of cases from the Division Court to the High Court, See chap. 44, s. 158.]

The jurisdiction of the Division Court being limited, it would, unless for this section, necessarily be in many cases a matter beyond the jurisdiction of such Court to investigate the subject of counter-claim, and the Legislature has very properly provided that where any defence or counter-

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id, unless, the juris-, and the counterclaim involves matters beyond such jurisdiction, the hands of the court sections shall not be stayed, but that it may fully investigate such matters. 74-76

Any counter-claim may be entertained up to the full amount of the plaintiff's claim. As soon as judgment is obtained of sufficient amount to overtop, or rather equal the claim of the plaintiff, then if the counter-claim is prima facie beyond the jurisdiction of the court, the counter-blaid its hand, and as regards the overplus of the counter-claim, that should be dealt with by some other court: Davis v. Flagstaff Silver Mining Co., 3 C. P. D. 228. The defendant is entitled to issue execution for any balance in his favor not exceeding \$100; Rule 152; or perhaps not exceeding the jurisdiction.

By the R. S. O. c. 44, s. 158, it is provided:

"In cases before any County or Division Court where the defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, the High Court, or any division or Judge thereof, may, on the application of any party to the proceeding, order that the whole proceeding be transferred from such court to the High Court or to any division thereof; and in such case the record in such proceeding shall be transmitted by the clerk or other proper officer of the County or Division Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein."

The record would be a complete transcript of the summons, the particulars of claim, the set-off or counter-claim, and all other papers on file in the court.

75. No privilege shall be allowed to any person to No privilege to exempt him from suing and being sued in a Division Court; exempt and any executor or administrator may sue or be sued diction of therein; and the judgment and execution shall be such as in like cases would be given or issued in the High Court.

R. S. O. 1877, c. 47, s. 57.

At one time certain classes were privileged from service of summonses or arrest: see Lyster v. Boulton, 5 U. C. R. 632; R. v. Gamble, 9 U. C. R. 546; but this abolishes any privileges in Division Courts.

76. A minor may sue in a Division Court for any sum Minors not exceeding \$100 due to him for wages, in the same for wages. manner as if he were of full age. R. S. O. 1877, c. 47, s. 58.

This is a special privilege given to minors, i.e., persons under 21 years of age.

It does not restrict infants from suing in the Division Courts for anything but wages, but was intended only to enable them to recover for their own labour in their own name: Ferris v. Fox, 11 U. C. R. 612. An infant has six years to bring such action after attaining his majority: Taylor v. Parnell, 43 U. C. R. 239. In suing for anything but wages, an infant must procure the attendance of a next friend at the office of the clerk of the court, at the time of entering the suit, who must undertake to be responsible for costs: Rule 126. See Becher v. McDonald, 5 Man. L. R. 223, as to the practice in the Province of Manitoba. The form of

such undertaking will be found at No. 7 of the Forms. It is doubtful if an infant can hire himself for wages to his parent, and whether the contract is binding on the latter: Perlet v. Perlet, 15 U. C. R. 165. The wages which a minor earns under a contract of hiring belong to himself, and not to his parents: Delesdernier v. Burton, 12 Gr. 569.

An infant cannot be a common informer: Garrett v. Roberts, 10 A. R. 650.

The right of a servant to recover his wages, when recoverable on an entire contract of service and payable in an indivisible sum, depends on the complete performance of his term of service. If hired, for instance, for a year for a lump sum as wages, and he leaves before his time has expired without just cause, he forfeits his wages: Huttman v. Boulnois, 2 C. & P. 510; Lilley v. Elwin, 11 Q. B. 742; Turner v. Robinson, 5 B. & Ad. 789; Blake v. Shaw, 10 U. C. R. 180. See also Warburton v. Heyworth, 6 Q. B. D. 1; Barrie Gas Co. v. Sullivan, 5 A. R. 110; 5 A. R. 115; 13 U. C. R. 205; L. R. 4 C. P. 330; L. R. 9 Q. B. 367; 1 H. & N. 266. But if the servant has been paid any portion of such year's salary the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service; and although the employer, on dismissing his servant, may have assigned one ground therefor, he is not precluded from afterwards shewing the entire ground for such dismissal: Tibbs v. Wilkes, 23 Gr. 439; but see Maw v. Jones, 25 Q. B. D. 107. The rule that an indefinite hiring is to be taken as a yearly one (Rettinger v. Macdougall, 9 C. P. 485), is not a rule of law, but the jury are to say what the terms of the hiring were, judging from the circumstances of the case; thus, on an indefinite hiring at certain weekly wages, the jury may infer the hiring was weekly: Baxter v. Nurse, 6 M. & G. 935. So a hiring at "two guineas a week for one year" is a weekly hiring: Robertson v. Jenner, 15 L. T. N. S. 514, per Bramwell, B.; or at "£2 a week and a house": Evans v. Roe, L. R. 7 C. P. 138, is a hiring by the week and not by the year. There is no inflexible rule that an indefinite hiring of a clerk must be construed as a hiring by the year: Fairn on v. Oakford, 5 H. & N. 635. In this case the plaintiff entered the defendant's employment at a salary of £250 a year, which was paid weekly. The jury found it a weekly hiring and the court refused to interfere: see also Rettinger v. Macdougall, 9 C. P. 485. Should a person be hired for a year, his wages payable at the rate of so much per month, it is submitted, on the authority of Taylor v. Laird, 1 H. & N. 266; Fairman v. Oakford, 5 H. & N. 635, and Button v. Thompson, L. R. 4 C. P. 330, to be clearly established that each month's wages would become vested at the end of each month and could not be divested by any misconduct of the servant, and that the rule about forfeiture of wages does not apply to such a case. The case of Walsh v. Walley, L. R. 9 Q. B. 367, is clearly distinguishable from the others. Where a master, having a right to discharge his servant for misconduct, condones the act and retains the servant, he cannot afterwards discharge him for the same act: Phillips v. Foxall, L. R. 7 Q. B. 680, per Blackburn, J.; but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offences may be invoked and put in the scale against the offender as cause for dismissal: McIntyre v. Hockin, 16 A. R. 498. With regard to menial or domestic servants there is a common understanding, though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages: Beeston v. Collyer, 4 Bing. 313, per Gaselee, J.; Fawcett v. Cash, 5 B. & Ad. 904; Nowlan v. Ablett, 2 C. M. & R. 54. If the master should, without just cause, turn the servant away without notice, the latter would be entitled to recover a month's wages beyond ubtful er the The imself,

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the arrears: Robinson v. Hindman, 3 Esp. 285; but see Maw v. Jones, 25 Q. B. D. 107. If a servant misconduct himself, the master may turn him away without any warning: Spain v. Arnott, 2 Stark, 256. A refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work, etc.), is a good ground of dismissal: s. c., and Lilley v. Elwin, 11 Q. B. 742. And it matters not how reasonable or urgent the excuse for the servant's wilful absence may be: Turner v. Mason, 14 M. & W. 112. See Mc-Edward v. Ogilvie Milling Co., 8 C. L. T. 150; 5 Man. L. R. 77. If a clerk claims to be a partner he can be forthwith dismissed: Amor v. Fearon, 9 A. & E. 548. So where a clerk disobeys a direction to apply remittances in a particular way: Smith v. Thompson, 8 C. B. 44; or a traveller neglects immediately to remit sums collected in accordance with the terms of his engagement: Blencarn v. Hodges' Distillery Company, 16 L. T. N. S. 608; or sells his employer's goods to a brothel keeper Ib.; or where a servant embezzles, though his wages due exceed what he has embezzled: Brown v. Croft, 1 Chitty, Prac. of the Law, 82. So where a servant employed to purchase goods for his master, accepts even on a single occasion a commission from the seller without his master's knowledge: Boston Deep Sea, &c., Co. v. Ansell, 39 Ch. D. 339: see Lister v. Stubbs, 45 Ch. D. 1; or is discovered in any gambling transaction or in the nature thereof: Pearce v. Foster, 17 Q. B. D. 536. See Priestman v. Brastreet, 15 O. R. 558. Where a person is engaged by a firm, the death of one of the partners puts an end to the contract, and no action can be brought against survivors for not employing the plaintiff: Tasker v. Shepherd, 6 H. & N. 575; Burnet v. Hope, 9 O. R. 10; but a voluntary parting with the business is a breach of the contract to employ: Stirling v. Maitland, 5 B. & S. 840; and the fact that the defendants' manufactory had been burnt down would be no excuse for dismissal: Turner v. Goldsmith, (1891), 1 Q. B. 544; It is different with a person paid by commission: Exparte Maclure, L. R. 5 Ch. 737: but see last case. It is an implied condition in contracts for personal service, that the death of either party shall dissolve the contract: Farrow v. Wilson, L. R. 4 C. P. 744. Incapacity in a servant from illness arising after a contract for personal service, absolute in its terms, has been entered into, is an answer to an action for its breach: Boast v. Firth, L. R. 4 C. P. 1; Robinson v. Davidson, L. R. 6 Eq. 269; 24 L. T. N. S. 755.

Incapacity of the servant from sickness does not determine the contract, nor will it justify dismissal without regular notice: R. v. Wintersett, Cald. 298. On the other hand, it has been held that a servant is entitled to be paid his wages during the time of illness: Patten v. Wood, 51 J. P. 549; 36 Alb. L. J. 399, 400. In Cuckson v. Stones, 1 E. & E. 248, it was held that temporary inability did not suspend the right to wages, but total and permanent disability, such as paralysis, etc., would justify a recision of the contract. But such total inability does not deprive the servant of his right to wages for the time he actually served, where the agreement is rot for any specified time: Bayley v. Rimmell, 1 M. & W. 506.

A sailor disabled in the course of his duty is entitled to wages for the whole voyage: Chandler v. Grieves, 2 H. Bl. 606 (note); 3 R. R. 525. Incompetence or ignorance will justify dismissal; Harmer v. Cornelius, 5 C. B. N. S. 236.

Where an apprentice, who could have been dismissed at a week's notice, was dismissed without notice, the defendants not acting under the notice clause, he was held entitled to recover for all damages flowing naturally from the breach, and was not limited to the value of a week's notice: Maw v. Jones, 25 Q. B. D. 107.

Section

Sections 76-77 A clerk taken into an office at "three months on trial at a salary of \$800 per annum," held not a yearly hiring: Hughes v. Can. P. L. & S. Socy., 39 U. C. R. 221.

A contract to serve for one year, the service to commence on the second day after that on which the contract is made, is a contract not to be performed within a year and is within the 4th section of the Statute of Frauds: Britton v. Rossiter, 11 Q. B. D. 123. It does not avoid the contract, but only bars the remedy: Maddison v. Alderson, 8 App. Cas. 473; McManus v. Cooke, 35 Ch. D. 681.

A suit by the servant against the master for debt arising out of an independent transaction is not a cause of a discharge of the servant: Clay Com. Telephone Co. v. Root, 33 Alb. L. J. 215.

Unless a specific contract of hiring be proved, the court will discountenance an action by child against parent or person occupying a parental position for services rendered while living in parent's, or such person's, house: Sprague v. Nickerson, 1 U. C. R. 284; Wismer v. Wismer, 28 U. C. R. 519; Peckham v. Depotty, 17 A. R. 273; and where an action was brought by a woman against her brother, with whom she had lived for several years, it was held there was no implied promise to pay: Redmond v. Redmond, 27 U. C. R. 220. But see Henricks v. Henricks, 27 U. C. R. 447. See also Re Ritchie, Sewery v. Ritchie, 23 Gr. 66; Pickering v. Ellis, 28 U. C. R. 187.

Where services rendered in expectation of marriage, but no contract of hiring, held that refusal to marry did not entitle plaintiff to maintain action for wages: Robinson v. Shistel, 23 C. P. 114.

Causes of section not to be divided.

77. A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds \$400. R. S. O. 1877, c. 47, s. 59.

Splitting a cause of action.—The rule against splitting of causes of action is but an application of the wholesome maxim "that he who did not speak when he should have spoken shall not now be heard when he should be silent."

It has frequently been found a difficult matter to say what is "dividing a cause of action" within the meaning of this section, and the corresponding section of the English Acts, 9 and 10 V. c. 95, s. 63; and 51 & 52 V. c. 48, s. 81. The expression "cause of action" in this section means "cause of one action," and is not limited to an action on one separate contract: Grimbley v. Aykroyd, 1 Ex. 479.

"A 'cause of action' is the entire set of facts that give rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment: " per Esher, M.R., Read v. Brown, 22 Q. B. D. 128; see Wright v. Arnold, 6 Man. L. R. 1.

Where a tradesman had a bill against a party for an amount within the jurisdiction of the court, in which bill the items were so connected with each other that the dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, and form one continuous demand, it was held to be lary of

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versed, , M.R., R. 1. within inected ith one ould be d to be a cause of action, within the meaning of the section, and the fact that one item in a tradesman's bill is separated from the rest by an interval of several years does not prevent the statute from operating: Copeman v. Hart, 14 C. B. N. S. 781; see also In re Grace v. Walsh, 10 U. C. L. J. 65; 3 P. R. 196.

In a contract for carrying timber by barge from one place to another, a charge for hauling by horses part of the way, it was held, formed part of the entire contract, and could not be sued for separately: Barnes v. Marshall, 18 Q. B. 785.

Prohibition will be granted when a party splits the cause of action to bring it within the jurisdiction of the Division Court: In re Grace v. Walsh, 8 P. R. 196: Gilbert v. Gilbert, 4 L. J. N. S. 229; Light v. Lyons, 7 U. C. L. J. 74; McRae v. Robbins, 20 C. P. 135.

Where premises were rented at \$125 a month, no formal lease being made and four months' rent became due, it was held that separate plaints for three instalments of rent was the splitting of a cause of action within this section: Re Gordon v. O'Brien, 11 P. R. 287.

In Wickham v. Lee, 12 Q. B. 526, Erle, J., says: "It is not a splitting of actions to bring distinct plants where in a Superior Court there would have been two counts. I am not sure whether the Court of Exchequer puts it so; but that is clearly the true construction of the Act." In that case it was held no contravention of the section to bring separate actions for rent of premises and also for double value for holding over after notice to quit.

A. having a cause of action against B. for £19 0s. 8d., for money lent between 1846 and 1849, also a cause of action on a separate account for goods sold and delivered, work and labour, and money paid, between 1845 and 1849 amounting to £19 19s. 0d., after deducting a payment of £8 5s. 3d. on account, levied two plaints in respect of them in the County Court. Held, that this was not a splitting of a cause of action within the section: Kimpton v. Willey, 9 C. B. 719.

So in Brunskill v. Powell, 1 L. M. & P. 550, it was held that goods sold and delivered, and money lent, though entered in the plaintiffs books as one account, were not one cause of action.

Two claims, one for salary and the other for money lent, can be sued separately and do not form one cause of action, in contravention of this section: Richards v. Marten, 23 W. R. 93.

A tradesman's bill for a series of articles (even though the claim was contracted within the jurisdiction of different courts) cannot be split into different causes of action: Bonsey v. Wordsworth, 18 C. B. 325, following Grimbley v. Aykroyd, 1 Ex. 479 and Wood v. Perry, 3 Ex. 442.

A demand for a horse sold, another for rent due, and a third for goods sold and delivered were held separate and distinct causes of action; and that a recovery for one was no bar to a recovery on either of the others: Neale v. Ellis, 1 D. & L. 163.

Money paid by the indorser of two notes, as against the executrix of the maker, was held one cause of action, and that the plaintiff having sued for and recovered one sum, could not bring another action for the amount of another payment made by him: per Logie, Co. J., Gilbert v. Gilbert, 4 L. J. N. S. 229, but see infra.

On the trial of an action for the breach of an alleged promise to return a yoke of oxen in as good condition as when they were hired, it appeared that defendants had been sued before for the hire of the same oxen in the same contract of hiring. Held, a splitting of the cause of action: Light w. Lyons, 7 U. C. L. J. 74, per Hughes, Co. J.

Section 77

It was held that a plaintiff had a right to bring two actions, one for work and labour and another for a balance due for money paid by him for goods in excess of the amount furnished to him: McRae v. Robins, 20 C. P. 135.

A defendant has not a right to say that there was a splitting of the action on the trial of the second action: Grace v. Walsh, 3 P. R. 196, per Draper, C.J.; Adkin v. Frind, 38 L. T. N. S. 393, See also Winger v. Sibbald, 2 A. R. 610; In re Box v. Green, 9 Ex. 503. There must be something done by the plaintiff (in the first action) to constitute an abandonment of the excess of the demand. Where the debt exceeds the sum to which the jurisdiction extends that enures as a defence, and entitles the defendant to judgment, unless the plaintiff elects to bring himself within the jurisdiction by abandoning the excess: Vines v. Arnold, 8 C. B. 632.

In 1887, the plaintiffs sued the council in the Division Court for the surplus school rates received by them in 1881 and recovered judgment. therefor. They afterwards brought an action in the County Court for the surplus received in the five subsequent years. The defendants contended that the claim was res judicata by reason of the judgment in the Division Court, and also that the plaintiffs were not entitled to recover. because by suing in the Division Court for the surplus of 1881 alone. they had divided their cause of action into two or more suits contrary to this section. Held (1), that the recovery in the Division Court being for a wholly distinct and separate cause of action, and not upon a balance of account under this section or after abandonment of the excess under Rule 7, was no defence to the second action; and (2) that if there had been a splitting of the cause of action within the meaning of the Act by suing for the surplus of one year alone, the objection should have been taken as a defence, or by way of motion for prohibition, in the first suit,. and could not be pleaded as a bar to this action.

Semble, that several claims, being entirely distinct and unconnected, did not form "one cause of action" so as to come within the prohibition of this section: Re Aykroyd, 1 Ex. 479 referred to. The proper form of judgment in the Division Court, where the excess is abandoned, or is forbalance of an account, pointed out: Public School Trustees of Section No. 9, Nottawasaga v. Tp. of Nottawasaga, 15 A. R. 310.

Where the plaintiff had a contract with the defendants for the delivery of a large quantity of deals, to be delivered by shipment in instalments, and upon delivery each shipment was to be paid for. *Held*, that the plaintiff was entitled to recover on each shipment as delivered, although all the deals contracted for had not been delivered: O'Leary v. Stewart, 9 C. L. T. 494.

The true distinction between demands, rights or causes of action, which are single and entire, and those which are several and distinct, is, could they all have been included in the prior statement of the cause of action, by this is not meant in the same petition or suit, for a party may have as many suits as he has causes of action, and may bring them at different times or at the same time; but if he brings them and they are depending at the same time and by the same tribunal he does so subject only to the right of consolidation, if they be such as could have been united in one petition: Secor v. Sturges, 16 N. Y. 554; Perry v. Dickerson, 85 N. Y. 345. Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are intringements of different rights and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person: Brunsden v. Humphrey, 14 Q. B. D. 141.

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Balance of an unsettled account.—By 39 V. c. 15, s. 2, the amount of an unsettled account inquirable into, was increased from \$200 to \$400. The cases decided before the change in this law must now be read "four" instead of "two" hundred dollars, as the maximum amount of an unsettled account.

Where plaintiff sued on a demand exceeding \$200, but abandoned the excess over \$99.75, and defendant claimed set-off exceeding \$400, consisting of various unconnected items: *Held*, within the jurisdiction of the court: Read v. Wedge, 20 U. C. R. 456.

Plaintiff claimed balance of £49 on two notes of £15 each and interest, gave credit for £23 and abandoned excess over £25; Held, that the court had jurisdiction: In re Higginbotham v. Moore, 21 U. C. R. 326.

An unsettled account exceeding \$400 reduced by payment to \$100 is not within the jurisdiction: Waugh v. Conway, 4 L. J. N. S. 228.

The plaintiff may recover \$100, being the balance of an unsettled account not exceeding \$400, but when the whole account exceeds that sum there is no jurisdiction.

An unsettled account means an account the amount of which has not been adjusted, determined or admitted by some act of the parties: See Robb v. Murray, 16 A. R. 503; Dougall v. Leggo, 1 West. L. T. 203, 246.

Where plaintiff sued for \$91 Laiance due for rent for several years at \$160 a year, after deducting payments made from time to time, held, not within the jurisdiction: Inre Hall v. Curtain, 28 U. C. R. 533, overruling Miron v. McCabe. 4 P. R. 171.

Plaintiff, before 39 Vic. c. 15, claimed \$94.88, annexing to his summons particulars of his claim shewing an account for goods for \$384.23, reduced by credits to the sum sued for; but nothing had been done by the parties to liquidate the account or ascertain the balance, except a small amount admitted to have been paid, and a credit of \$33 given for some returned barrels, but which still left an unsettled balance of upwards of \$300. Held, not within the jurisdiction: Re The Judge of Northumberland and Durham: 19 C. P. 299.

Plaintiff, who was employed by defendants to purchase wool for them on commission, sued them for this commission and \$10 paid to an assistant. It appeared that defendants had furnished plaintiff with \$1,100, and that plaintiff had expended \$36 beyond that sum in the purchase of wool, but no question was made at the trial as to the due expenditure of \$1,100, the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the \$36 or any part of it, the plaintiffs demand being confined to the commission claimed on the quantity of wool purchased, and not on the price paid: Held, not an action for balance of an unsettled account exceeding \$200, the balance of the unsettled account being \$36, which was not in question: McRae. v. Robins, 20 C. P. 135.

Plaintiff, before the passing of 39 Vic. c. 15, sued for \$30 due as a balance of an account for board for self and horse, which appeared at the trial to be for a balance of an unsettled account exceeding \$200. He also sued for board for self and horse for a subsequent period, and abandoned the excess of \$12 over \$100. On objection being taken to the jurisdiction, the Judge allowed an amendment. The plaintiff then altered his claim, reducing it to \$32, only, and the case was again tried and judgment reserved, where pon application was made for prohibition. Held, that the Division Court had jurisdiction independently of 39 Vic. c. 15, s. 2, but that under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was, therefore, no necessity for any amendment: In re McKenzie v. Ryan, 6 P. R. 328.

Section 77

Sections It was also held in that case that a plaintiff, to give a Division Court jurisdiction where his claim is in excess, must abandon the excess in his claim, and cannot wait until the hearing, and then do it. But this decision was not followed in White v. Galbraith, 12 P. R. 513, in which to was held that the Judge can allow the plaintiff to amend his claim before or at the trial, upon such terms as he thinks fit; see Stogdale v. Wilson, 8 P. R. 5. The plaintiff could not by abandoning the excess, or in any other way, give jurisdiction: Dougall v. Leggo, 11 C. L. T. 83, 116; 1 West. L. T. 246.

See section 255 and notes thereto.

A claim reduced by set-off is not within this section: Woodhams v. Newman, 7 C. B. 654. It is the balance of an unsettled account: Ib.

Judgment to be full discharge.

78. A judgment of a Division Court upon an action brought for the balance of an account shall be a full discharge of all demands in respect of the account for the balance of which such action was brought and the entry of judgment shall be made accordingly. R. S. O. 1877, c. 47, s. 60.

The judgment must of course be between the same parties or their privies: McIntosh v. Jarvis, 8 U. C. R. 535.

In Winger v. Sibbald, 2 A. R. 610, it was held that the commencement of a suit in a Division Court for part only of an entire claim, and endorsing an abandonment of the balance on the summons, is not per se a release of the excess, but the part so abandoned cannot be sued for after the recovery of judgment in such suit : see also Vines v. Arnold, 8 C. B. 632; Nelson v. Couch, 15 C. B. N. S.; Public School Trustees of Nottawasaga v. Nottawasaga, 15 A. R. 310.

The Judge should be particular to order that judgment be entered for the plaintiff as the section directs, namely: "in full discharge of his cause of action as set forth in the claim." D. C. Form 51. If the plaintiff objects, the defendant is entitled to judgment: see 15 A. R. 320.

79. In case the debt or damages claimed in an action removed by brought in a Division Court amounts to \$40 and upwards, in certain and in case it appears to any of the Judges of the High Court that the case is a fit one to be tried in the High Court, and in case a Judge thereof grants leave for that purpose, the action may by writ of certiorari be removed from the Division Court into the High Court upon such terms as to payment of costs or other terms as the Judge making the order thinks fit. R. S. O. 1877, c. 47, s. 61.

Debt or damages .- It is upon this section that the right of certiorari

It will be observed that application may be made to any of the Judges of the High Court, and we think that, since the O. J. Act, a Division Court case may be removed to any Division of the High Court. Before that Act it was not the practice to remove cases to the Court of Chancery. Certiorari pre-supposes jurisdiction in the inferior court.

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Judges ivision Before ancery.

Where a Division Court has not the jurisdiction to entertain or try a section case, this section will have no application: Wiltsie v. Ward, 8 A. R. 549; Ferguson v. Sampey, 10 C. L. T. 110; Whidden v. Jackson, 18

A defendant cannot wait and take the chances of a decision in his favour, and, finding it adverse, apply for a Writ of Certiorari: Knight v. Medora, 11 O. R. 188; in Appeal, 14 A. R. 112, sustaining Black v. Wesley, 8 U. C. L. J. 277; Gallagher v. Bathie, 2 L. J. N. S. 78, and Holmes v. Reeve, 5 P. R. 58.

When proceedings in the Division Court have been removed by certiorari into the High Court, a rule or order to set aside the proceedings by any such court for irregularity should be made in the High Court. suit was removed by certiorari from the Division Court to one of the Superior Courts, upon its being shewn that a question of law as to the application of the Statute of Limitations would arise on the trial: Ridley v. Tullock, 3 U. C. L. J. 14. This case can only have application, we submit, where the Statute of Limitations cannot fairly be discussed or decided in the Division Court.

The form of certiorari will be found in the Consolidated Rules. See also R. S. O. 556.

When a Judge has declined to grant a certiorari, the court will not do so merely because it appears that possibly a serious question of law may arise, nor merely because the decision in the particular case, though involving directly only a small sum, may be of great importance to the applicant as likely to affect other cases of a similar nature: Staples v. Accidental Death Ins. Co., 10 W. R. 59.

A justice of the peace sued in the Division Court, and having given notice of his objection under section 89, sub-section 7, cannot afterwards move for certiorari: Weston v. Sneyd, 1 H. & N. 703.

Interpleader proceedings cannot be removed: ex parte Summers, 18 Jur. 522; Jones v. Harris, 6 U. C. L. J. 16; Russell v. Williams, 8 U. C. L. J. 277; Finlayson v. Howard, 1 P. R. 224.

And it is submitted that under our statute it does not apply to replevin: Mungean v. Wheatley, 6 Ex. 88.

We have no provision such as section 121 of the English Acts, 9 and 10 Vic. c. 95, and 51 & 52 Vic. c. 43, s. 137, for removing actions of replevin by certiorari.

All the material facts relative to the state of the cause should be brought before the Judge, and where a writ has been obtained without the Judge having been informed that the cause had already been heard for several days in the County Court, the writ was set aside as improvidently issued: Parker v. B. & E. Ry. Co., 6 Ex. 184. Certiorari will not lie after verdict: Tully v. Gla s, 3 O. S. 149; or after judgment and execution: Douglas v. Hutchinson, 5 O. S. 341; McKenzie v. Keene, 5 U. C. L. J. 225; or where a defendant knows all the facts before a trial, but, nevertheless, argues the case and obtains an opinion from the Judge. even though the Judge desire it: Holmes v. Reeve, 5 P. R. 58. The expression of a wrong opinion by a Judge is no cause for removal: Ib. Certiorari is too late, if delivered to the Judge after verdict rendered; and the spirit of the English statute, 43 Eliz. cap 5, applies where plaintiff's witnesses were sworn and no jury called: Black v. Wesley, 8 U. C. L. J. 277, per Richards, J. If the Judge has entered on the hearing of the cause, certiorari is too late: Gallagher v. Bathie, 2 L. J. N. S. 73; Barnes v. Cox, 16 C. P. 236; s. c., 2 L. J. N. S. 67. Certiorari will not lie at the instance of the plaintiff to determine whether inferior court had jurisdiction. The writ imports jurisdiction: Meyers v. Baker, Hargreaves v.

Myers, 26 U. C. R. 16; O'Brien v. Welsh, 28 U. C. R. 894. A suitbrought by an incorporated company will be removed where difficult questions of law are likely to arise: Cataraqui Cemetery Co. v. Burrowes, 8 U. C. L. J. 47. Also where defendant resided in a part of the Province far distant from the division in which the suit was commenced, and also on account of a difficult question of law: Nugent v. Chambers, 3 U. C. L. J. 108. A plaintiff is not entitled to remove his own suit: Prudhomme v. Lazure, 8 P. R. 355; Dennison v. Knox, 9 U. C. L. J. 241. A Judge cannot be attached for disobeying a certiorari, unless he acted contumaciously in order to vex the party or shew contempt for the court: Re Judge of Niagara District Court, 3 O. S. 437. The order for certiorari may be made ex parte: Symonds v. Dimsdale, 2 Ex. 533: but it is very unusual in this Province to do so. In the case of Ex parte Great Western Ry. Co., 2 H. & N. 557, the court refused to make it a condition that defendant, if successful, should have no more than inferior court costs. Affidavit for order for writ of certiorari must be entitled in the court in which the application is to be made, and not in the Division Court: Ex parte Nohro, 1 B. & C. 267; Symth v. Nicholls Co., 1 P. R. 355. Application for the writ must be made by the party himself, either in person or by attorney, and cannot be made by another person in his name: R. v. Riall, 11 Ir. C. L. R. 280. A section in an Act taking away certiorari does not apply to the case of a total absence of jurisdiction: Ex parte Bradlaugh, 3 Q. B. D. 509. The return to the writ should be under seal: R. v. Kenyon, 6 B. & C. 640. The original record must be returned: Askew v. Hayton, 1 Dowl. 510; Palmer v. Forsyth 4 B. & C. 401. The court will not direct how proceedings are to be carried on after removal: Copping v. McDonell, 5 O. S. 311; but might direct that the amount of the plaintiff's claim be paid into court: Symonds v. Dimsdale, 2 Ex. p. 538. Where cases are removed from a Division Court of an outer county into one of the Superior Courts by certiorari, the papers should be filed in the Crown office at Toronto; but the venue need not be laid in the County of York: Chambers v. Chambers, 3 U. C. L. J. 205, per Draper, J. Where certiorari regularly issued after a new trial granted, a previous alleged understanding that the cause should be tried in the Division Court is no ground for interfering with the certiorari: Help v. Lucas, 8 U. C. L. J. 184. After removal, there is noway of compelling a plaintiff to proceed in the higher court: Dennison v. Knox, 3 P. R. 150; 9 U. C. L. J. 241; Garton v. The G. W. R. Co., 1 E. & E. 258. After removal a plaintiff cannot declare for a different cause of action than that sued for in court below: Mason v. Morgan, 3 P. R. 325; Hunter v. G. T. R. Co., 6 P. R. 67. Judge in court below has no right, after certiorari, to interfere with case until it goes back to hiscourt by procedendo: Barnes et al. v. Cc , 16 C. P. 236; Ewing v. Thompson, 8 U. C. L. J. 332. An order for certiorari, to bring up a case into a Superior Court, entitles defendant to full costs of that court if he succeeds in the action without any certificate from the Judge who tries the cause: Corley v. Roblin, 5 U. C. L. J. 225. A defendant will not, however, get the costs of removal unless the order provides for them; Kerr v. Cornell, 1 L. J. N. S. 326.

In Gegg. v. Adams, 9 C. L. T. 311; 10 C. L. T. 2, an order to transferthe actions was refused; but it was imposed upon the plaintiff, as a termin dismissing the appeal, that he should undertake to submit to examination before the trial in the Division Court.

An application to remove a cause by certiorari should be made in Chambers: Bowen v. Evans, 3 Ex. 111; C. R., Form 157,

PROCESS AND PROCEDURE.

Bactions

NO. When it is by this Act provided that a claim Court may be entered, or an action brought, or that any action may be person or persons may be sued in any Division Court, or tried to have full that an action may be transferred to any other court power. such court shall have jurisdiction in the premises, and all proceedings may be had and taken both before and after judgment in or relating to any such claim or cause as may now be had, and taken in or relating to any claim or cause which has been lawfully entered in the Court holden for the division in which the cause of action arose, or in which the defendant or any one of several defendants resided or carried on business at the time the action was brought. 43 V. c. 8, s. 12.

May be entered .- See section 94 and following sections.

Or action brought .- The issue of the first process, and the service of it, may be considered "bringing an action."

May be transferred .- See notes to section 87.

Or changed.—The place of trial may be changed under section 86, See notes to that section.

Such Court.—This refers to the court in which the action may be brought, etc.

LIVISION IN WHICH ACTIONS TO BE ENTERED.

81. Any action cognizable in a Division Court may be In what entered and tried in the Court holden for the division in actions which the cause of action arose or in which the defendant entered or any one of several defendants resides or carries on business at the time the action is brought, notwithstanding that the defendant at such time resides in a county or division different from the one in which the cause of action arose. R. S. O. 1877, c. 47, s. 62.

Territorial Jurisdiction.—This section provides that any action in respect of which the Division Court has jurisdiction may be entered and tried, (1) "in the court holden for the division in which the cause of action arose," or, (2) "in which the defendant or any one of several defendants resides or carries on business."

What is a cause of action.—A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved: per Lord Esher, M.R.,

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Section Read v. Brown, 22 Q. B. D. 131. "Everything which is necessary to make the action maintainable is part of the cause of action:" per Maule, J., Borthwick v. Walton, 15 C. B. 501. Attention, therefore, has to be paid to the onus of proof. If upon the failure of the plaintiff to prove any fact, the defendant would be immediately entitled to judgment. that fact is part of the cause of action: per Fry, L.J., 22 Q. B. D. 132. In an action upon a contract it may be necessary to prove the contract. the performance thereof by the plaintiff and the breach. If all of these facts did not occur in the same division the cause of action did not arise therein and the court for that division would have no jurisdiction: Watt. v. Van Every, 23 U. C. R. 196; Noxon v. Holmes, 24 C. P. 541; Kemp v. Owen, 14 C. P. 432; Carsley v. Fiskin, 4 P. R. 255. A contract arrived at by proposal and acceptance is made where it is accepted: Newcombe v. De Roos, 2 E. & E. 271; O'Donohoe v. Wiley, 43 U. C. R. 350; but see Green v. Beach, L. R. 8 Ex. 208. If the parties use the post or telegraph office as a means of communication, the sending by the proposer of his proposal from a place outside the division is no part of the cause of action. "It is as if he were speaking to the person to whom such [letter or] telegram is directed at the place towhich he directs it to be sent, and where he intends it to be delivered. The authority to transmit the message when established is merely evidence which goes to fix the sender with the responsibility of sending it. but it is no part of the cause of action:" per Hawkins, J., Cowan v. O'Connor, 20 Q. B. D. 642, followed in Noble v. Cline, 18 O. R. 33; see also Grundy v. Townsend, W. N. (1888) 67; but see contra, Hagle v. Dalrymple, 8 P. R. 183.

"If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same if I myself went there and made them:" per Lord Lyndhurst, 1 Dow & Clark, 342: see Jackson v. Grimley, 16 C. B. N. S. 380. "Suppose the two parties stood on different. sides of the boundary line of the district, and that the order was then verbally given and accepted, the contract would be made in the district in which it was accepted:" per Hill, J., Newcombe v. De Roos, 2 E. & E. 275. The material fact appears not to be where was the letter written or the agent appointed, but was the proposal written by, or was the party acting as agent, actually the agent of the party with whom the contract completed within the division, was made : see also Green v. Beach, L. R. 8 Ex. 208.

The following are illustrations of the application of the rule. In: suits for goods sold and delivered the contract must be made, the goods delivered, and the breach, viz., the non-payment, take place, within the same division: Borthwick v. Walton, 15 C. B. 501; Barnes v. Marshall, 18 Q. B. 785; Jackson v. Beaumont, 11 Ex. 300; Re Walsh, 1 E. & B. 383; Kemp. v. Owen, 14 C. P. 432; Carsley v. Fiskin, 4 P. R. 255; Wattv. Van Every, 23 U. C. R. 196; Re Elliott v. Norris, 17 O. R. 78.

In an action for a reward the offender was apprehended in one division and convicted in another. The cause of action did not arise in either district: Hernaman v. Smith, 10 Ex. 659. In actions on bills, notes or cheques against the drawer, acceptor or maker, the drawing, accepting or making and the dishonour must occur in the same division : Noxon v. Holmes, 24 C. P. 541; Trevor v. Wilkinson, 31 L. T. N. S. 731; Wilde v. Sherridan, 16 Jur. 456; 21 L. J. Q. B. 260; King v. Farrell, 8 P. R. 119; Re Olmstead v. Errington, 11 P. R. 367; Cooke v. Gill, L. R.

In an action against an endorser the action cannot be brought in the division in which he writes his name, though the dishonour takes place in that division, if the delivery takes place in another division, as the

indorsement is not complete until delivery: Buckley v. Hann, 5 Ex. 43; see Marston v. Allen, 8 M. & W. 494; Heath v. Long, 1 L. M. & P. 333.

In an action for money had and received the receipt must take place within the division: Re Garland v. Omnium Securities Co., 10 P. R. 135;

Rennie v. Ratcliff, 35 L. T. N. S. 833.

In an action on a warranty of a horse, the contract of sale must be made and the warranty given within the division: Aris v. Orchard, 6 H. & N. 160. Where a solicitor sued a mortgagor for costs of preparing a mortgage for which he received no instructions from the mortge or, it was held that the consent of the mortgagor to become such was a material part of the cause of action: Jackson v. Grimley, 16 C. B. N. S. 380. Where a debt has been assigned, the assignment is a material fact for the plaintiff to prove, and it must, therefore, have been made within the division: Read v. Brown, 22 Q. B. D. 128. Where a cause of action is complete before the death of the debtor, the probate of his will is no part of the cause of action: McCallum v. Gracey, 10 P. R. 514; but where an action was brought for a legacy against an administrator with the will annexed, the cause of action was held not to be complete without proof of the letters of administration; Re Fuller v. Mackay, 2 E. & B. 573. An admission made within the jurisdiction, if sufficient to state an account, will give jurisdiction: Grundy v. Townsend, W. N. (1888) 67. In an action against a railway company for illegally putting a passenger off a train, the cause of action arises at the place of putting off, and not where the ticket was issued: Ralph v. G. W. Ry. Co., 14 L. J. N. S. 172; see Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527. In an action for witness fees, the cause of action comprises the service of the subpoena. and the attendance at court: Whitehead v. Burt, 7 T. L. R. 609.

Where defendant resides .- "What is the meaning of the word 'resides'? I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep:" per Bayley, J., R. v. North Curry, 4 B. & C. 959. "Usual place of residence" means the dwelling in which he lives with his family and and sleeps at night: R. v. Hammond, 17 Q. B. 772; Grogan v. London & M. Ins. Co., 53 L. T. N. S. 761. It is an "ambiguous word," may receive a different meaning according to the statute in which it is found: per Cotton, L.J., Re Bowie, ex parte Breull, 16 Ch. D. 484. Ordinarily, men are supposed to reside where their wives and families do, but this is not always correct. A man may reside in one place and his wife and family in another: Cartwright v. Hinds, 3 O. R. 384, 395 and cases cited. Cockburn, C.J., in Wellington v. Whitchurch, 4 B. & S. 106, says, the maxim: "that a husband's domicile is where his wife lives, applies only where a man is generally in one place and occasionally elsewhere. That is the general rule, but in the interpretation of the meaning of these words every case must depend upon its own circumstances.

A person who has no permanent place of abode "dwells" at the place at which he may be temporarily residing: Alexander v. Jones, L. R. 1 Ex. 133. The domicile of the husband is that of the wife: Macdonald v. Macdonald, 5 U. C. L. J. 66. Defendant worked in the Province of Quebec, but his wife and family lived across the river in Ontario, where his wife bept a store, and where he often came to see her. Held, that defendant residence was with his family, and that he was subject to be sued in the proper Division Court in Ontario: In re Ladouceur v. Salter, 6 P. R. 305. Where a man having his permanent residence at one place, has a lodgir g, for a temporary purpose, at another place, held that he does not "dwell" at the latter place: Macdougall v. Paterson, 11 C. B. 755. In the argument and from the remarks of Maule, J., at p. 763 of the report in this case, it appears to have been taken for granted that

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"residence" and "dwelling" were synonymous. The same view was taken by Cockburn, C.J., in Butler v. Ablewhite, 6 C. B. N. S. 747. A temporary or compulsory residence, at the time of the commencement of the action, in gaol does not constitute the place of dwelling of the party: Dunston v. Paterson, 5 C. B. N. S. 267.

The residence must be of a permanent character, and not merely featemporary purpose: Marsh v. Conquest, 17 C. B. N. S. 418.

A man may have two permanent places of residence, and the question of jurisdiction must depend on the fact "where his actual residence, at the time of action brought, was:" per Cockburn, C.J., Butler v. Ablewhite, 6 C. B. N. S. at p. 747; Pilgrim v. Knatchbull, 18 C. B. N. S. 798. See also Kerr v. Haynes, 2 L. T. N. S. 11; Bailey v. Bryant, 1 E. & E.

A company is only "domiciled or ordinarily resident" where its head office is; Jones v. Scottish Accident Ins. Co., 17 Q. B. D. 421, and cases there cited: Watkins v. Scottish Imperial Ins. Co., 23 Q. B. D. 285.

Where a railway company had their principal office in London and a station at A. Held, that they carried on business in London, not at A.: Shields v. G. N. Ry. Co., 7 Jur. N. S. 631; and 8 U. C. L. J. 195. A corporation has been held to dwell where its business is carried on: Taylor v. Crowland Gas, etc., Co., 11 Ex. 1.

The G. W. Ry. Co., has its principal station at Paddington, where the directors meet, the secretary resides, and general meetings are held, and whence orders emanate. Held, that the company "dwells" at Paddington within the meaning of 9 and 10 Vic. c. 95, s. 128: Adams v. G. W. Ry. Co., 6 H. & N. 404, and this decision has been followed in Ahrens v. McGilligat, 23 C. P. 171; Westover v. Turner, 26 C. P. 510. See also The Oldham B. & M. Co. v. Heald, 3 H. & C. 132; Palmer v. Caledonian Ry. Co., (1892), 1 Q. B. 823.

It is no objection to the jurisdiction that the defendant has become resident within the division for the very purpose of giving jurisdiction; provided that the residence was actual and hona fide and not colourably and collusively acquired before issuing the summons: Massey v. Burton, 2 H. & N. 597; Baker v. Wait, L. R. 9 Eq. 103. But a plaintiff cannot by making a person, who is in his interest, and who resides within the jurisdiction of a certain Division Court, a defendant in a suit for the purpose of giving that court jurisdiction: Baker v. Wait, supra. The case of Bridges v. Douglas, 13 L. J. N. S. 358, is at variance with the above case, but it must be observed that the attention of the learned Judge (Morrison, J.), who decided Bridges v. Douglas, was not called to the English case above referred to. It seems to the writer that to give jurisdiction in such a way would not only be a fraud on the other defendants, but on the statute itself.

A company for the manufacture and sale of goods, however, "dwells" at the place of manufacture and sale, and not at its registered office, and is distinguished, in this respect from a railway company: Keynsham B. L. Lime Co. v. Baker, 2 H. & C. 729.

But a building contractor "carries on his business" where his general place of business is, and not at the locality where particular contracts are being executed: Gorslett v. Harris, 29 L. T. O. S. 75.

A joint stock company "dwells" where the substantial business of the company and its negotiations are carried on, and not necessarily in the locality where its property is situated and its immediate objects carried on: Aberystwith Pro. Pier Co. v. Cooper, 13 L. T. N. S. 273. Cockburn, C.J., says, the company "cannot be said to dwell at the pier at Aberystwith."

A foreign corporation established by foreign law which sets up an office within the jurisdiction, and carries on a principal part of its business here, ought to be considered as resident here as if established by our law: Haggin v. Comptoir d'Escompte de Paris, 23 Q. B. D. 519; Badcock v. Cumberland Gap Park Co., 9 T. L. R. 113.

Where a defendant carries on business.—The phrase "carrying on" implies a repetition or series of acts: per Brett, L.J., Smith v. Anderson. 15 Ch. D. 247. See also Re Siddall, 29 Ch. D. 1; Crowther v. Thorley, 48 L. T. N. S. 644; Re Thomas, 14 Q. B. D. 379; Harris v. Amery, L. R. C. P. 148.

To "carry on" business means, primarily, to carry on one's own business; therefore it cannot be said in reference to a salaried clerk "that he carries on business" at the place where his employer's office is: Lewis v. Graham, 20 Q. B. D. 780; s. c. sustained, 22 Q. B. D. 1; Buckley v. Hann, 5 Ex. 43; Sangster v. Kay, 5 Ex. 386; Le Taileur v. S. E. Ry. Co., 3 C. P. D. 18.

"The business must be some business in which he has control, or acts as one of the partners engaged in carrying it on," and "a particular clerk or workman who is engaged about the business, but has no control over it whatever, cannot be said to carry on business:" ver Coleridge, C.J., Lewis v. Graham, supra. A clerk in the Admiralty does not "carry on business" at his office within section 40, London Small Debts Act: Buckley v. Hann, 5 Ex. 43, nor does a deputy sealer in the Court of Chancery: Rolfe v. Learmonth, 14 Q. B. 196; ror a clerk in the Privy Council office: Sangster v. Kay, 5 Ex. 386; nor a partner in a mine on the cost-book principle, the business of which is wholly carried on by an agent: Mitchell v. Hender, 18 Jur. 430.

But there is no principle of law which decides what "carrying on" trade is; a multitude of circumstances make up what is called "carrying on" a trade, for it is a compound fact made up of a variety of things: per Jessel, M.R., Erichsen v. Last, 8 Q. B. D. 414.

A firm carrying on business in Scotland, with a branch office within the jurisdiction of a County Court in England, were sued in the firm's name, and the summons was served at the branch office: Held, that the firm "carried on business" within the jurisdiction; that the service was good, and that the County Court Judge was wrong in declining to exercise jurisdiction; that if the service had been bad, it amounted to a mere irregularity, which might be waived by the conduct of the defendants: Weatherly v. Calder, 61 L. T. N. S. 508.

The words "carries on business" were said by Coleridge, C.J., in Rolfe v. Learmouth, 14 Q. B. 199, to mean "some fixed place at which the party's business is carried on, at least for a certain time,"

A surgeon and apothecary, who occupies a position similar to that of a general medical practitioner in this country, has been held to "carry on business" when he daily attends patients, although resident out of it: Mitchell v. Hender, 18 Jur. 430.

A railway company "carries on business" only at its principal office where the directors meet and the general business of the company is transacted: Minor v. Lon. & N. W. Ry. Co., 1 C. B. N. S. 325; Brown v. L. & N. W. Ry. Co., 4 B. & S. 326: LeTailleur v. S. E. Ry. Co., 3 C. P. D. 18: Shields v. The G. N. Ry. Co., 7 Jur. N. S. 631, and 8 U. C. L. J. 195; Ahrens v. McGilligat, 23 C. P. 171; Pearson v. C. P. Ry. Co. 1 West. L. T. 47; Westover v. Turner, 26 C. P. 510. In the latter case it was also held that the fact of the railway company having in addition to its local station, a factory for the making and repair of the rolling stock used on the road, and employing a number of workment herein, did not bring such place within the statute.

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By the appointment of a general agent to do business in a place a corporation cannot be held to be carrying on business there. The question is whether the person doing business is the servant of the defendant: Corbett v. The General Steam Nav. Co., 4 H. & N. 482. Where an agent had a firm's name affixed to his office and their note paper contained a heading referring to his office as their London address, but his authority was limited, it was held that the firm did not carry on business at his office: Baillie v. Goodwin, 83 Ch. D. 604; Grant v. Anderson, (1892), 1 Q. B. 108.

As to notice disputing the jurisdiction, see section 176 and notes thereto.

Actions may be brought and tried in the Court the defend ant's residence.

82. (1) Such action may be entered and tried and determined in the court the place of sitting whereof is the nearest to the residence of the defendant, and the action nearest to may be entered, tried and determined irrespective of the place where the cause of action arose, and notwithstanding that the defendant at the time resides in a county or division other than the county or division in which the Division Court is situate, and the action entered.

Service of summons in such cases.

(2) It shall be sufficient if the summons in such case be served by a bailiff of the court out of which it issues, in the manner provided in section 96 of this Act; and upon judgment recovered in any such action a writ of fieri facias against the goods and chattels of the defendant, and all other writs, process and proceedings to enforce the payment of Execution the judgment, may be issued to the bailiff of the court, and be executed and enforced by him in the county in which the defendant resides, as well as in the county in which judgment was recovered. R. S. O. 1877, c. 47, s. 63.

Nearest to the residence of the defendant.—It will be observed that the place of sitting which is nearest to the residence of the defendant shall determine the right to bring an action under this section. The residence of the clerk, or the place of holding his office, will form no part of the consideration. As to what is the place of sitting, see Malcolm v. Malcolm, 15 Gr. 13; Moffatt v. Carleton Place Board of Education, 5 A. R. 202. See also section 8 and notes thereto. As to place of residence, see notes to section 81.

By rule 5, plaintiff must, in his claim, set out that he enters the suit and desires to have it tried because the place of sitting is nearest to the defendant's residence.

This distance is measured as the crow flies: Mouflet v. Cole, L. R. 8 Ex. 32; Duignan v. Walker, 5 Jur. N. S. 976; Atkyns v. Kinnier, 4 Ex. 776; and the word "nearest" has been held to be synonymous with "next": Smith v. Campbell, 19 Ves. 400; see also Bathard v. London Sewers Co., 54 J. P. 135.

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The "place of sitting" refers to the building in which the Court is Sections held, and not the mere municipality.

Insurance Premium Notes.—The R. S. O. c. 167, s. 133, "The Ontario Insurance Act," provides: "An action cognizable in a Division Court upon or for any premium note or undertaking, or any sum assessed or to be assessed thereon, may be entered and tried and determined in the court for the division wherein the head office or any agency of the company is situate: Provided always, that the provisions of this section shall not apply to nor include any such premium note or undertaking made or entered into after the first day of Ju'y, 1885, nor any sum assessed thereon, unless within the body of such note or undertaking or across the face thereof, there was at the time of the making or entering into the same, printed in conspicuous type, and in ink of a colour different from any other in or on such note the words following: 'Any action which may be brought or commenced in a Division Court in respect or on account of this note or undertaking, or any sum to be assessed thereon, may be brought and commenced against the maker hereof in the Division Court for the division wherein the head office or any agency of the company is situate." It was held that the corresponding section of the R. S. O. 1877, c. 161, s. 71, now repealed, did not apply to the suing of a premium note taken under the 46th section of that Act for the cash payment on the insurance: The Canada Farmers' M. Ins. Co. v. Welsh, decided in 1876 (not reported), per Hagarty, C.J.

Building Societies. - R. S. O. c. 169, s. 36, An Act Respecting Building Societies. "If the amount in arrear (for calls) does not exceed \$40, the action may be brought in the Division Court of the Division wherein the office of the society is kept."

The whole amount in arrear for calls must be included in one action; see section 77 and notes thereto.

88. In case a person desires to bring an action in a When actions division other than as in the next preceding two sections may be brought in mentioned, a County Judge may by special order authorize other than the regular an action to be entered and tried in the court of any Divisions. division in his county adjacent to the division in which the defendant or one of several defendants resides, whether such defendant resides in the county of the Judge granting the order or in an adjoining county. R. S. O. 1877, c. 47, s. 64.

The summons need not state on the face of it that it was issued by order of the Judge: Waters v. Handley, 6 D. & L. 88. The order must be granted "by the Judge before whom the action is to be tried under the order:" Rule 123. Formerly this was different: McWhirter v. Bongard, 14 U. C. R. 84. As to the mode of procedure to obtain the order, see Rule 16, and Forms 8 and 9. "No leave shall be given to bring a suit in a division, other than the one adjacent to the division in which the party to be sued resides, but the division may be in the same or an adjoining county: Rule 123. The word "adjacent" here means, it is submitted, "contiguous or bordering upon:" see Kingsmill v. Millard, 11 Ex. 313; Earl of Lisburne v. Davies, L. R. 1 C. P. 259, and per Erle,

Sections 84-86

Where defendant is a corporation the head office of which is not in Province.

84. In every case where the defendant is a corporation not having its head office in the Province and the cause of action arose partly in one Division and partly in another, the plaintiff may bring his action in either Division. 50 V. c. 8, Sched.

This section was int.oduced as part of Division Court legislation during the session of 1887. It was intended to get over the difficulty of suing a corporation that had its head office out of the Province and where the cause of action did not arise in any one division in this Province. The summons may be served in the same way as an ordinary summons for service upon a corporation that has its head office out of the Province; as to which see section 101.

Where money made payable out of the Province,

85. Where the debt or money payable exceeds \$100, and is by the contract of the parties made payable at a place out of the Province of Ontario, the action may be brought thereon in any Division Court, subject, however, to the place of trial being changed upon the application of one or more of the defendants, as provided by the next succeeding section. 43 V. c. 8, s. 9.

Debt or money payable.—See notes to section 86. Contract of the parties.—See notes to section 86.

Out of the Province of Ontario.—For instance, if a note were made payable in Montreal, it would be suable in any Division Court in this Province, provided the amount of it exceeded \$100 and if in other respects the Division Court had jurisdiction. It would also, of course, be suable where the defendants or one of them resided.

Next succeeding section.—The proceedings necessary to obtain the change will be found fully discussed in the next succeeding section.

Place of trial.

- 86. (1) Where the debt or money payable exceeds \$100, and is made payable by the contract of the parties at any place named therein, the action may be brought thereon in the court holden for the division in which the place of payment is situate, subject, however, to the place of trial being changed to another division in which the court holden therein has jurisdiction in the particular case.
- (2) To procure such change an order to that effect is to be obtained by the defendant from the Judge of the county in which the action is brought.
- (3) The application for the order is to be made within eight days from the day on which the defendant who makes the application was served with the summons, where

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- (4) The application is to be on an affidavit that the applicant intends to defend the action, that he has a good defence upon the merits, that the cause of action did not wholly arise in the division in which the action is brought, and that the witnesses for the defence, or some of them, reside within the division in which the defendants, or one of them, resided or carried on business at the time the action was brought, and that the application is not made for the purpose of delay; the date of the then next two sittings of the court to which he seeks to have the cause transferred is also to be shewn.
- (5) The affidavit must be made by a defendant, or his solicitor or agent in case satisfactory reasons are given why the affidavit is not made by a defendant.
- (6) The order shall direct at what sittings of the court the action shall be tried, subject to all rights of postponement as in other cases, and shall be attached to the summons and other proceedings in the action by the clerk, who shall forthwith transmit the same to the clerk of the court in which the action is by such order directed to be tried, and shall enter a minute thereof in his procedure book.
- (7) Upon receipt of the order and other papers by the clerk of such last mentioned court, he shall enter the action and proceedings in his procedure book.
- (8) All the papers and proceedings in the cause thereafter shall be entitled and had and carried on as though the action had originally been entered in the said last mentioned court.
- (9) It shall be the duty of the defendant obtaining the order forthwith to serve, or cause to be served, a copy of

section the same upon the plaintiff or his agent in the same manner as summonses are required to be served under this Act.

43 V. c. 8, s. 8.

Debt or money payable.—This and the next preceding section are only applicable to such claims as are suable under section 70, subsection 3.

The words "debt or money payable" are not identical with those used in that sub-section, but they mean substantially the same.

Any place named therein.—Any form of words employed by the parties which reasonably indicate a particular place of payment would be within this section. A bill or note payable "at the Bank of Montreal in Toronto," or at the office of the payee or any other person in any particular place, without further words of designation, would be within the section.

May be brought.—The plaintiff has the option of bringing the action in the court for the division in which place of payment is situate. See Interpretation Act, section 8, sub-section 2; R. v. Bishop of Oxford, 4 Q. B. D. at p. 554; Cameron v. Wait, 3 A. R. 175, per Harrison, C.J. The general jurisdiction of the court is unaffected by this section.

Jurisdiction in the particular case. - As to jurisdiction in each particular case see notes to section 81.

Where a Division Court becomes seized of the right to entertain a claim under this section, it would possess that right until the close of the case: Haldan v. Beatty, 43 U. C. R. 614.

Sub-Section 2.—The application is to be made by the defendant, or, if there be more than one, by or on behalf of all, to "the Judge of the county in which the action is brought." The clerk would be entitled to the same fees, of and about the order, as he would in other matters.

Sub-section 3.—The application must be made within eight days from the day of service of the summons, when the defendant, or one of the defendants, resides within the county in which the action is brought, or within 12 days if none of the defendants reside within such county. The Judge has no power to enlarge this time: Serjeant v. Dale, 2 Q. B. D. 558; Hudson v. Tooth. 3 Q. B. D. 46; Barker v. Palmer, 8 Q. B. D. 9; see R. v. Murray, 27 U. C. R 134; and cases cited 9 P. R., p. 236; Grant v. Holland, W. N. (1880) 156; Exparte Luxon. In re Pidsley, 20 Ch. D. 701;

"Within" so many days from or after an event means exclusive of the day of service: Williams v. Burgess, 12 A. & E. 635; Robinson v. Waddington, 13 Q. B. 753; Mitchell v. Foster, 12 A. & E. 472; Stroud, 889; Radcliffe v. Bartholomew, (1892), 1 Q. B. 161.

For instance, if a summons was served on the 10th day of the month, the 18th and 22nd would respectively be the last days for the application. If the last of such days fell on a holiday, then the application could be made on the following day: Inter. Act, s. 8, s-s. 17.

Should the Judge be away from home and the defendant be unable, for that reason, to apply on the last day, it would be sufficient for him to leave the papers, on which he rested his application, with the clerk or at the Judge's Chambers within the proper time, and then his application could be considered as "made." See R. v. Allen, 4 B. & S. 915; Berridge v. Fitzgerald, L. R. 4 Q. B. 639; Bain v. Gregory, 14 L. T. N. S. 601; Lewis v. Calor, 1 F. & F. 306; Hughes v. Griffiths,
13 C. B. N. S. 334; Mumford v. Hitchcocks, 14 C. B. N. S. 361; Christopher v. Croll, 16 Q. B. D. 66; Re Sweetman and Gosfield, 13 P. R. 293. nner Act.

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r him clerk en his . & S. ry, 14 iffiths, Chris-3. 293. On affidavit.—The formal requirements of affidavits generally in Division Court proceedings are regulated by Rule 133. The Judge "shall not be bound to reject as insufficient" any affidavit not in accordance with the Rule. See section 143.

A clerk or commissioner in taking an affidavit, should subscribe, not only his name, but the word "Commissioner" or "Com." or "Clerk," as the case may be: Pawson v. Hall, 1 P. R. 294; Brett v. Smith, 1 P. R. 309; Babcock v. Mun. Council of Bedford, 8 C. P. 527.

Should the parties be described in the summons by initials or by a wrong name, the affidavit may also use such initials or wrong name: DeForrest v. Bunnell, 15 U. C. R. 370; Sims v. Prosser, 15 M. & W. 151; Hodgson v. May, 7 D. & L. 4; R. v. Sheriff of Surrey, 8 Dowl. 510; Beauchamp v. Cass, 1 P. R. 291.

The deponent should sign his usual signature; and if he does so, it is no objection that it does not correspond with the name given in the affidavit: Folger v. McCallum, 1 P. R. 352; Hands v. Clements, 11 M. & W. 815.

The signature may be in a foreign character: Nathan v. Cohen, 3 Dowl, 370.

If sworn in a foreign country, and that fact duly certified to, the absence of the signature of deponent has been held no objection: In re Howard; In re Ashcroft, L. R. 9 C. P. 347; but if the signature of the commissioner were omitted, the affidavit would not be received: Nisbet v. Cock, 4 A. R. 200.

Affidavits purporting to be sworn on a day not arrived are void: In re Robertson, 5 P. R. 132.

The jurat may be referred to, to explain the date of a fact deposed to in the affidavit: Lyman v. Brethron, 2 Chamb R. 108.

The presumption of law is that an affidavit is in the same state as when it was sworn, as to alter it is an act of fraud and misconduct which will not be presumed: R. v. Gordon, Dears. C.C. 586.

An affidavit purporting to be "sworn before at, etc.," omitting the word me, held sufficient: Martin v. McCharles, 25 U. C. R. 279; but where the words were "sworn at, etc." omitting before me, it was held insufficient: Archibald v. Hubley, 18 S. C. R. 116.

It is particularly to be noted that the affidavit must state the six distinct facts enumerated in sub-section 4. The omission of any one fact would be fatal to the application. It is submitted that if the necessary facts are sworn to, the Judge has no discretion to refuse the application.

The affidavit must be made, etc.—This is imperative, and unless some satisfactory reasons are given an affidavit of the attorney or agent would not be sufficient: sve Herschfeld v. Clarke, 11 Ex. 712; Christopherson v. Lotinga, 15 C. B. N. S. 809; Barwick v. De Blaquiere, 4 P. R. 267; Tiffany v. Bullen, 18 C. P. 91: Frederici v. Vanderzee, 2 C. P. D. 70.

The "satisfactory" reasons which it will be necessary to show will depend on the circumstances of each case. But, it is submitted, that, in general, the only valid reason would be the impossibility of obtaining the defendant's affidavit, at the time when it was required, after all reasonable efforts had been made to do so. A slight inconvenience would not be sufficient. What are satisfactory reasons is a question for the Judge.

Notice to plaintiff.— The statute does not expressly or impliedly state that the order can be made, ex parte. It is submitted, therefore, that the plaintiff should have an opportunity of shewing cause.

Sections 86-87 "It is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them: "per Willes, J., Thorburn v. Barnes, L. R. 2 C. P. at p. 401; see Fisher v. Keane, 11 Ch. D. 853; Ex parte Tucker. In re Tucker, 12 Ch. D. 303; R. v. Law, 27 U. C. R. 260.

No provision is made for the costs of the application, so that only costs of the ordinary fees of the clerk and bailiff under the tariff would be allowable.

Should one of the parties die during the consideration of the application, the Judge could still make the order, dating it as of the day of the argument: Ward v. Vance, 3 P. R. 210.

Forthwith transmit.—The duty of the clerk in this respect is imperative, and his wrongful refusal could be followed by mandamus: R. v. Fletcher, 2 E. & B. 279; In re Linden v. Buchanan, 29 U. C. R. 1, and it would probably be granted with costs: R. v. Langridge, 24 L. J. Q. B. 73; 1 Jur. N. S. 64. As to the meaning of "forthwith" see note to section 20.

Shall enter.—The plaintiff must prepay the clerk's costs, otherwise he would not be obliged to enter the suit. See section 54.

It is submitted that the defendant would have the same time for giving notice disputing the plaintiff's claim, as he would have had if the summons had been originally issued from the court to which the action is removed, unless the Judge has, by his order, prescribed the time within which the defendant should give such notice.

Forthwith cause to be served.—As to meaning of "forthwith," see note, section 20.

Should the defendant not take out the order, or serve it as the statute requires, he would be taken to have abandoned it: Kenny v. Hutchinson, 6 M. & W. 134; Belcher v. Goodered, 4 C. B. 472; Normanby v. Jones, 3 D. & L. 143; Herr v. Douglass, 26 U. C. R. 357; S. C. 4 P. R. 102; Morley v. Bank of B. N. A., 10 U. C. L. J. 128; Ferguson v. Elliott, 7 P. R. 7; Kelly v. Wade, 14 P. R. 13; Molsons Bank v. Dillabaugh, 9 C. L. T. 488.

Should the order be waived or abandoned, it is not necessary to move to set it aside: Re Wilson and Hector, 9 U. C. L. J. 132.

Same manner as summonses.—As to the manner of serving summonses, see sections 96-99.

When action entered in wrong court by mistake.

87. If an action shall be entered in the wrong Division Court, which might properly have been entered in some other Division Court of the same or any other county, the cause shall not abate as for want of jurisdiction, but on such terms as the Judge shall order, all the papers and proceedings in the cause may be transferred to any Division Court having jurisdiction in the premises, and shall become proceedings thereof as though the cause were at first properly entered therein, and the same shall be continued and carried on to the conclusion thereof as though the action had originally been entered in the said last mentioned court, [but the party making the application

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conough last ction shall satisfy the Judge by affidavit of the alleged want of jurisdiction of the said court. The clerk of the court to which proceedings have been so transferred, shall place the action on the list for trial at the next sittings of his court, if he receives the papers in the cause six clear days or more before the date of the said sittings, but if not, then he shall place it on the list for trial at the sittings next thereafter; and he shall forthwith, after receiving the said papers, notify the parties or their agents by mailing them registered notices informing them of the date, hour and place of said sittings, and the clerk of the court issuing the summons shall certify in detail to the court to which the case is transferred all the costs incurred in the said action up to the date of such transfer.] 43 V. c. 8, s. 11; 52 V. c. 12, s. 5.

Originally it was only in cases where the action was brought by "mistake or inadvertence" in the wrong Division Court that the Judge was empowered to transfer it to the proper court. But by 52 Vic. c. 12, s. 5, the words "by mistake or inadvertence" were struck out; and the section is now applicable to all cases which "may be entered in the wrong Division Court," and "which might properly have been entered in some other Division Court of the same or any other county."

It applies, therefore, to all cases to which the Division Court jurisdiction extends.

It has always been a subject fruitful of discussion under the English County Courts Act and our Division Courts Act, what the proper district or division was in which to sue. See sections 69 and 70 and notes thereto for the authorities upon this question. It is a matter for the Judge to determine before ordering the transfer.

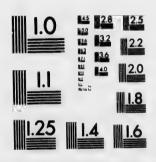
The application for transfer need not be made before the [trial: Re Thompson v. Hay, 12 C. L. T. 486.

Such terms as the Judge shall order.—The terms a Judge should impose will depend entirely upon the circumstances of each particular case. It has been held that if the section, as now amended, did not take away the right to prohibition it at least contemplated an application being made in the first instance to the County Judge and where a defendant applied for prohibition before trial without having first made an application to the Judge of the Division Court to remove the action to the proper court, it was held that prohibition would not lie: In re Watson v. Wolverton, 9 C. L. T. 480; affirmed by C. P. Divl. Ct. (not reported).

But if the Judge declines to try the question, a motion for prohibition may properly be made, and the onus of having the case transferred to the proper court is upon the plaintiff: Re Thompson v. Hay, 12 C. J. T. 486

The proceeding is somewhat analogous, so far as terms are concerned, to an application to postpone a trial or an amendment of proceedings, in both of which cases the general rule is to impose the payment of costs.

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Formerly the power of a Judge-to impose costs, in such cases, was doubted, but by section 207, sub-section 2, that difficulty is removed.

Either party may make the application. If the defendant has disputed the jurisdiction and the court is satisfied that it has no jurisdiction the plaintiff would be unsafe in taking judgment: Re Thompson v. Hay, 12 C. L. T. 486.

Satisfy the Judge by affidavit.—See notes to section 86 as to affidavits and other proceedings on an application such as this.

The section does not declare what Judge is meant. No doubt the power to impose terms refers to the Judge of the court in which the suit is entered and not the Judge of the court to which it is transferred. It is not necessary that the affidavit should specify the date of the sittings to which the case transferred shall be tried, as is the case under sub-section 6 of the next preceding section.

It will be observed that there is no power to transfer a case upon the ground of preponderance of convenience or any other ground recognized in the High Court and County Courts. If the court has jurisdiction to try the case (otherwise than under sections 85 and 86) no court has power to order a transfer.

List for trial.—It is customary for the clerk to make out a list for the Judge and one for the use of litigants and others having business in court. An action which has been transferred under this section or the next preceding one will of course be placed upon such list. As to the manner of preparing the list of cases for trial and the order in which actions are to be tried see section 115, and notes thereto.

At the next sittings of the Court.—The "next sittings of the court" means the sittings which shall be held next following the date on which the papers and proceedings are received by the clerk. See Booth v. Vicars, 13 L. J. Ch. 147; R. v. Surrey, 6 Q. B. D. 100; R. v. Sussex, 4 B. & S. 966

Six clear days or more.—The phrase "clear days" means that the time is to be reckoned exclusive of both the first and last days: Liffin v. Pitcher, I Dowl. N. S. 767; In re Sams and the City of Toronto, 9 U. C. R. 181: In re Railway Sleepers' Supply Co., 29 Ch. D. 204; Zouch v. Empsey, 4 B. & Ald. 522; R. v. Shropshire, 8 A. & E. 172; R. v. Aberdare Canal Co., 14 Q. B. 854. The day on which the papers were received and the court day would be excluded. See also notes to sections 96 and 125. For instance if the papers were received on the 1st of any month, and the court was to be held on the 8th of that month the case should be set down for trial at that court, but if the court were to be held on the 7th. the case should not be set down for that one, but for the next succeeding court.

Forthwith.—The word "forthwith," as it is used here, implies "speedy and prompt action and an omission of all delay; in other words, that the thing to be done should be done as quickly as is reasonably possible:" per Cockburn, C.J., R. v. Berkshire Jus., 4 Q. B. D. 469. See notes to section 20.

Mailing them registered notices.—The notice required must be sent by post, prepaid, and registered. It would not be a compliance with the statute to deliver it personally or in any other way than that pointed out. It must contain the date, hour, and place of sittings of the court. As to effect of an omission by the clerk to give such notice: see notes to section 176.

Costs incurred, etc.—The clerk of the court in which the action was originally commenced should be paid his costs at the time the claim was entered for suit, and he is not bound to act until they are paid, nor would the clerk of the court to which the transfer is made be obliged to

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on was m was id, nor iged to enter the suit until his costs are paid. See section 54 and notes thereto. Sections The order of transfer should be charged for under the 17th, item of the tariff, not under the 13th. Each clerk will only be entitled to charge for the proceedings taken in his own court, and the clerk of the court issuing the summons is here required to certify in detail to the court to which the case is transferred all the costs incurred, etc., up to the date of such transfer.

"In detail" implies that there should be an account showing not only the total amount but full particulars of the services performed and the amount of each item of the costs incurred: see Colman v. G. E. Ry. Co., 4 B. & Macn. 108; Stroud, 494.

It is submitted that the plaintiff being responsible for the entry of the action in the wrong court the defendant should not be obliged to pay double costs and that the order transferring the action should make provision in that respect.

88. Every clerk or bailiff may sue and be sued for Clerks and bailiffs any debt due to or by him, as the case may be, separately may sue and be or jointly with another person in the court of any next adjoining adjoining division in the same county, in the same manner, divisions. to all intents and purposes, as if the cause of action had arisen within such next adjoining division, or the defendant was resident therein, and no clerk or bailiff shall bring any action in the Division Court of which he is clerk or bailiff. R. S. O. 1877, c. 47, s. 65.

(2) Nothing in this section contained shall be taken to prevent any proceedings from being continued in the court in which the action was brought, where such action was commenced before the appointment of such clerk or bailiff. 52 V. c. 12, s. 6.]

It would be highly improper for officers of the court to have control of suits against themselves against the will of the plaintiff. This provision is merely permissive as regards persons who may wish to sue an officer of the court, but the prohibition as to a clerk or bailiff is complete. In other words a clerk or bailiff can be sued in his own division, but he cannot himself sue for anything there.

It has been said: "For any other cause of action but a 'debt,' must not a clerk or bailiff sue in a higher court, if cause of action arose in his own and defendant resides in his division? He cannot sue in his own division for anything whatever, and he can only sue in the 'next adjoining division' where it is for a 'debt' due him: " See 1 L. C. G. 54; 2 L. C. G. 142, See also 4 U. C. L. J. 157; 9 U. C. L. J. 99.

Quere.—Can a clerk sue in the adjoining division upon a cause of action not arising in his own division against a person not resident therein? The language of the section would appear to cover such a case. The intention, however, must have been to substitute the court of the adjoining division for the clerk's court, when such court had complete jurisdiction and was really the only court in which otherwise the action could be brought.

Sections 88-89

As to meaning of "adjoining division" see notes to section 89.

Sub-section 2.—This clause has been added since the publication of Sinclair's Con. D. C. Act, 1888. In that work the author expressed the opinion that "should there be a suit in the name of such clerk or bailiff in any court before his appointment, it is submitted that it could be enforced in the ordinary way, notwithstanding such appointment.

Place of trial in actions against clerk or bailiff.

judgment.

89. Notwithstanding anything in this Act contained, a clerk or bailiff of a Division Court may be sued in the court of an adjoining county, the place of sitting whereof is nearest to the residence of the defendant without the county in which he holds his office as clerk or bailiff; and Enforcing upon a transcript of a judgment which may be recovered against any clerk or bailiff in such action being sent to and received by the clerk of the court of any division adjoining the division for which the defendant was or is clerk or bailiff in the county in which the last named division is situate, with a certificate of the amount due on such judgment, as provided by section 217 of this Act, such proceedings for enforcing and collecting the judgment by way of execution and otherwise may be had and taken in the Division Court to which the transcript has been so sent by the officers thereof as may be had or taken for the like purpose upon a judgment regularly recovered in any Division Court. 43 V. c. 8, s. 15.

May be sued.—See notes to section 88.

Adjoining county.—The term "adjoining" means touching or contiguous as distinguished from lying near or adjacent; in contact with: Re Ward, 52 N. Y. (1873) 397; Miller v. Mann, 55 Vt. 479 (1882). In a penal statute the word means "absolutely contiguous, without anything between: " per Parke, J., R. v. Hodges, Moo. & M. 341. But the meaning in other statutes is less strict: **ee Lon. & S. W. Ry. Co. v. Blackmore, L. R. 4 H. L. 610; Hobbs v. Mid. Ry. Co., 20 Ch. D. 418, per Manisty, J. And an "adjoining owner" was held to include an owner of land separated from surplus lands of a railway by only a private road over which such owner had a right of way: Coventry v. L. B. & S. C. Ry. Co., L. R. 5 Eq. 104. See also Harrison v. Good, L. R. 11 Eq. 338.

Nearest to the residence. The place of sitting does not here refer to the municipality, but the building in which the court is held: Re-Timson, L. R. 5 Ex. 257; Shaw v. Morley, L. R. 3 Ex. 137; Bowes v. Fenwick, L. L. 9 C. P. 839; Eastwood v. Miller, L. R. 9 Q. B. 440; Haigh v. Sheffield, L. R. 10 Q. B. 102; Snow v. Hill, 14 Q. B. D. 588.

As to how distance is to be measured, see notes to section 82.

As to residence of a party, see notes to section 81.

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here refer held: Re Bowes v. . B. 440; D. 588.

The permission here given to sue a clerk or bailiff is confined to the Sections courts of an adjoining county, and provision is also made for the enforcement of a judgment by transcript in the division in the same county adjoining his own.

90. Any action, by or against a Judge or Junior Judge Action against of a County Court, which is within the competence of a County Judge or Division Court, may be brought in a Division Court of Stipendiary Magisany county adjoining that in which the Judge or Junior trate. Judge resides, and any action by or against a Stipendiary Magistrate, if the same is within the jurisdiction of any Division Court of his district, may be brought in any Division Court of any adjoining county or district. R. S. O. 1877, c. 47, s. 66.

Within the Competence of a Division Court. - In every case the claim must be one within the competence of some Division Court. Even the consent of the parties cannot confer jurisdiction in a case which is beyond the competence of any Division Court: Jones v. Owen, 5 D. & L. 669; Buse v. Roper, 41 L. T. N. S., 457; Wellesley v. Withers, 4 E. & B. 759; Foster v. Usherwood, 3 Ex. D. 3.

Judge or Junior Judge resides .- The County Court Act provides that a Judge or Junior Judge shall reside in the county in which he is such; so that "adjoining county" may be taken to mean the county adjoining that of which the person sued is Judge or Junior Judge.

91. Notwithstanding anything in this Act contained, Trial may by consent any action within the jurisdiction of the Division Court be in any division. may be entered, tried and finally disposed of by the consent of all parties in any Division Court. 43 V. c. 8, s. 10.

Consent of all parties.—Before the introduction of this section, parties could not, expressly or otherwise, confer jurisdiction if the want of it appeared on the face of the proceedings. In such cases "there was a total want of jurisdiction which no assent could cure:" per Patteson, J., Jones v. Owen, 5 D. & L. 669. The consent here has more especial reference to cases sued in the wrong division, in which the parties may agree to give the court the right to try and dispose of them as if properly

The same effect is attained by the defendant failing to comply with

The section does not prescribe a written consent, and therefore such is unnecessary: R. v. Salop (Jus.), 4 B. & Ald. 626; R. v. Surry (Jus.), 5 B. & Ald. 539; R. v. Huntingdonshire (Jus.), 19 L. J. M. C. 127; R. v. Lincolnshire (Jus.), 3 B. & C. 548. Contrast section 116; R. v. Nichol, 40 U. C. R. 76.

The consent may be in writing, in words, or by acts or conduct. Consent in writing signed by the parties or their solicitors, would in all cases be preferable. But the verbal consent of the parties would be equally as efficacious, though more difficult of proof if disputed. The word "consent" means "agreement of mind," "concurrence of wills," "approval:" Anderson 230. It is "an agreement of the mind to what

Sections is proposed or stated by another": Plummer v. Commonwealth, 91-93 1 Bush. 78; In Siggers v. Evans, 5 E. & B. at p. 374, Erle, J., says: "assent is an ambigious word; it may mean an external act, or a resolution of the mind.

> In general, knowledge of the fact is an essential element in such cases in order to bind a defendant by his conduct: Westloh v. Brown, 43 U. C. R. 402; In re Collie, 8 Ch. D. at p. 817; Johnson v. Credit Lyonnais Co., 3 C. P. D. at p. 40, per Cockburn, C.J. See also Cross-man v. Shears, 3 A. R. 583; Wallace v. Fraser, 2 S. C. R. 532; Polak v. Everett, 1 Q. B. D. 669; P. v. Lock, L. R. 2 C. C. 14, per Quain, J.; La Banque Jacques Cartier v. La Banque D'Epargne, etc., de Montreal, 13 App. Cas. 111.

> Whether or not consent has been given is a matter of fact, not of law: Mason v. Farnell, 12 M. & W. 674.

> The consent could be given at any time before trial, or even on the face of the contract. Both parties must consent; but the plaintiff's consent may be presumed from the fact of his suing in a particular court, or taking a security with such a consent as the section requires on the face of it.

Clerk to forward summonses for service in other divisions.

92. The clerk of any Division Court shall, when required, forward all summonses to the clerk of any other Division Court for service, and the clerk of any Division Court shall receive any summonses sent to him by any other Division Court clerk for service, and he shall hand the same to the bailiff for service, and when returned shall receive the same from the bailiff and return them to the clerk from whom he received them, and every clerk shall enter all such proceedings in a book to be by him kept for that purpose. R. S. O. 1877, c. 47, s. 67.

Shall receive any summonses.—The clerk may under sections 54, 55 and 56 insist on prepayment of his own and bailiff's fees. See notes to those sections.

Notices to be in writing.

93. In all cases not already provided for, where, in any action or proceeding in a Division Court, it is necessary for any party thereto to give notice to any other party thereto or to the clerk of the court such notice shall be in writing. 48 V. c. 14, s. 8.

In writing.—"Writing," or "written," or any term of like import, shall include words printed, engraved, lithographed or otherwise traced or copied: Interpretation Act, section 8, sub-section 14. The language of this section is imperative, and any verbal notice would be inoperative, and might be entirely disregarded: Re McGregor v. Norton, 13 P. R. 223. Entry of Cla

94. (1) The plaintiff sha (and, if necessary, copies) of n writing in detail (and in c demand) and each copy shall order in which the copies summons shall be issued, bear claim or demand on the mar in substance with such form General Rules or Orders rela time to time in force, acc account, claim or demand, an evidence shall be given by action except such as is cont demand so entered. R. S. C

(2) In any action brough due on a promisory note, th clerk before judgment, unles the loss of the note be shew other satisfactory reason be

Particulars of his demand .- TI manner of entering a Division Con enter with the clerk a copy, and, if or demand in writing in detail, a actions under section 70, class (prescribes how each copy shall be i

On the trial of the cause no evid cause of action, except such as is cmand so entered, or in the particul unless an amendment is made.

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As to the copy of summons and defendant, chargeable under any ci

Entry of Claim, Service, etc.

(1) The plaintiff shall enter with the clerk a copy Plaintiff to necessary, copies) of his account, claim or demand of his claim with ag in detail (and in cases of tort, particulars of his claim with and each copy shall be numbered according to the a which the copies are entered, and thereupon a shall be issued, bearing the number of the account, demand on the margin thereof, and corresponding ance with such form as may be prescribed by the Rules or Orders relating to Division Courts from time in force, according to the nature of the claim or demand, and on the trial of the cause no shall be given by the plaintiff of any cause of accept such as is contained in the account, claim or so entered. R. S. O. 1877, c. 47, s. 68.

In any action brought to recover a sum of money a promisory note, the note shall be filed with the fore judgment, unless otherwise ordered, or unless of the note be shewn, or that it cannot for some tisfactory reason be produced. 49 V. c. 15, s. 7.

plars of his demand.—This section makes provision as to the entering a Division Court suit. The plaintiff is required to the clerk a copy, and, if necessary, copies of his account, claim d in writing in detail, and in cases of tort (that is personal nder section 70, class (a), particulars of his demand, and how each copy shall be numbered and entered.

trial of the cause no evidence shall be allowed concerning any tion, except such as is contained in the account, claim or dentered, or in the particulars of demand, if the action is in tort, amendment is made.

that the claim should contain, see Rules 3 and 4.

aim when "entered with the clerk" should contain all the of this section and of the Rules referred to, and would not be f it did not.

erk is not entitled to make any charge for the claim attached ginal summons whether made out by himself or not. The bound to furnish it, and by section 95, the copy of the claim so is to be attached to the summons. When this is done, the and claim are complete, and there is nothing to be done by the spect of the claim for which he is entitled to charge.

he copy of summons and claim only two are, in the case of one chargeable under any circumstances.

Sections 94-95 The clerk is not bound to prepare a suitor's claim, and he would be exercising a wise discretion by refusing to do so and be thereby acting within the spirit, at well as the letter, of the 100th. Rule.

If a debt is assigned the action should be brought in the name of the assignee: Wellington v. Chard, 22 C. P. 518; Cousins v. Bullen, 6 P. R. 71; and the assignee must take the full beneficial interest: Wood v. McAlpine, 1 A. R. 234. A mortgage of debts is an absolute assignment: Burlinson v. Hill, 12 Q. B. D. 347; Tanored v. Delagoa Bay Co., 23 Q. B. D. 239; Comfort v. Betts, (1891), 1 Q. B. 737. There can be an equitable assignment of a small sum out of a larger amount: Brice v. Bannister, 3 Q. B. D. 569; Ex parte Hill, 10 Ch. D. 615; Ex parte Moss. In re Toward, 14 Q. B. D. 310; James v. Newton, 2 New Eng. Rep. 820; 23 Cent. L., J. 489.

Whether a creditor can split up a single cause of action into many actions, without the consent of his debtor, is an interesting question, and the general opinion seems to be that he cannot. Mr. Justice Story said: "A debtor has a right to stand on the singleness of his original contract, and to decline any legal or equitable assignment by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to other persons:" Mandeville v. Welch, 5 Wheat. 286.

A debtor cannot, however, disregard an equitable assignment of a part, and cannot compromise or settle with the assignor or even modify the terms of the contract without the consent of the assignee after notice of the assignment: Brice v. Bannister, 3 Q. B. D. 569.

If the debtor consents to the assignment, as by accepting an order, the assignee may sue without making other holders of the demand parties to the suit: Grant v. Aldrich, 38 Cal. 514. Where there has been a partial assignment, the proper course would seem to be to make the assignor, if he retains any interest, and the other assignees, parties to the action against the debtor, and have the rights of all parties declared. The debtor in such cases might be allowed to retain his costs out of the fund: see Lett v. Morris, 4 Sim. 607; Smith v. Everett, 4 Bro. C. C. 64; James v. Newton, 2 New Eng. Rep. 820, where the American authorities are collected.

An accepted order is equivalent to payment as against the creditor or persons claiming Mechanics' Liens under him: Jennings v. Willis, 22 O. R. 439.

Frequently such forms of account as, "to amount of account rendered" are given, as the particulars here required. Such are insufficient. The statute requires particulars in detail. As to the claim and particulars, see D. C. Rules, 3 to 8.

Promissory Note.—Before suing on a lost note, a plaintiff should tender sufficient security, otherwise he would be made to pay the costs of the suit: La Banque Jacques Cartier v. Stachan, 5 P. R. 159.

Sub-section 2 was evidently intended for the purpose of altering the law as declared in the case of In re Drinkwater v. Clarridge, 8 P. R. 504, in which it was held, that the clerk was bound to enter judgment on a special summons, without the production of the note sued on. The note must now be filed with the clerk before judgment.

Plaintiff to furnish particulars ticulars of his claim or demand, and the clerk shall annex of claim to the plaintiff's particulars to the summons, and he shall furfor service nish copies thereof, to the proper person to serve the same.

R. S. O. 1877, c. 47, s. 69.

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By section 94 the plaintiff is required to enter with the clerk a copy, and if necessary, copies, of his account, etc. This section prescribes that he shall also furnish the clerk with particulars of his claim or demand, and it is made the duty of the clerk to annex the same to the summons. The summons is then complete and is to be delivered by the clerk to the proper person to serve the same.

Should the clerk neglect to do this, it would not vitiate the proceedings. They could be amended, if necessary, upon proper terms, the principle of law, that the act of the court shall not injure any man, being applicable.

Any damage which the plaintiff might sustain by want of reasonable care on the part of the clerk, would be the subject of an action against him and his sureties.

96. The summons, with a copy of the account or of summons the particulars of the claim or demand attached, shall be to be ten days. served ten days at least before the return day thereof. R. S. O. 1877, c. 47, s. 70.

Ten days at least.—This means ten clear days, that is exclusive of the day of service and the day of the return. Sunday would be included as one of the days: Re Railway Sleepers Supply Co., 29 Ch. D. 204. As to service, see section 99 and notes thereto.

Return day.- The "return day" means the day on which the summons is returnable. Its primary meaning is the day originally fixed for the hearing: R. v. Leeds County Ct., 16 Q. B. D. 691.

A defendant does not waive his right to the full time for trial by entering a disputing notice: Zaritz v. Mann, 16 L. J. N. S. 144. See also Barker v. Palmer, 8 Q. B. D. 9; Hudson v. Tooth, 3 Q. B. D. 46.

97. [In case the defendant does not reside, or in case service of none of the defendants, if there be more than one, reside in summons absent the county in which the action is brought, the summons dants. shall be served fifteen days at least before the return thereof.] 52 V. c. 12, s. 8.

This section formerly provided in effect, that the summons should be served 15 days at least before the court, where both of the defendants, or one of them, resided in an adjoining county; and that where none of the defendants resided in an adjoining county, the summons should be served 20 days at least before the return day thereof. That provision was repealed, and the one here given substituted in lieu thereof.

98. There shall be endorsed upon every summons a Indorsenotice informing the defendant that in any case in which summons. an order may be made changing the place of trial, application must be made to the Judge within eight days after the day of service thereof (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen days or more before the return). 43 V. c. 8, s. 13. D.C.A.-9

Sections

Sections 98-99

This notice seems to be material only in cases falling within section 86, i.e. cases where the amount claimed exceeds \$100, and the action is brought in the division where it is payable.

The time within which the application must be made to the Judge to change the place of trial is specific. No power is given to the Judge to enlarge the time. If, after due service made, application is not made within the time prescribed by this section, the right would be gone. See the notes to section 86 hereof.

When service to be otherwise.

99. In case the amount of the account, claim or personal or demand exceeds \$15, the service shall be personal on the defendant, and in case the amount does not exceed \$15, the service may be on the defendant, his wife, or servant, or some grown person being an inmate of the defendant's dwelling-house, or usual place of abode, trading or dealing. R. S. O. 1887, c. 47, s. 72, amended by 52 V. c. 12, s. 9.

> Claim or demand.—A sum included for interest will form part of the claim or demand;" Insley v. Jones, 4 Ex. D. 16; Rodway v. Lucas, 10 Ex. 670, per Pollock, C.B.; Smart v. Niagara & Detroit Ry. Co., 12 C. P. 406, per Draper, C.J.; Northern Ry. Co. v. Lister, 4 P. R. 120; McKenzie v. Harris, 10 U. C. L. J. 213. See notes to section 70.

> Exceeds \$15.—Should the claim be one cent over \$15, service would have to be personal.

> Personal service.—Personal service means serving the defendant with a copy of the process, and showing him the original if he desire it: Goggs v. Huntingtower, 12 M. & W. 503.

> Merely showing the summons to the defendant would not be good service; a copy must be left with him: Worley v. Glover, 2 Str. 877. If, on the refusal of a defendant to take the copy of the summons, the officer brings it away with him, the service is not good: Pigeon v. Bruce, 8 Taunt. 410; Erwin v. Powley, 2 U. C. R. 270,

> Unless the defendant, within a reasonable time, asks to see the original summons, it need not be shewn to him: Petit v. Ambrose, 6 M. & S. 274; Thomas v. Pearce, 2 B. & C. 761.

> It has been held, that 15 minutes was not an unreasonable time: Westley v. Jones, 5 Moore, 162.

> If inspection of the original is demanded and refused the service is bad: Weller v. Wallace, R. & J.'s Dig. 2872.

> The following have been held to be cases of personal service: Where the writ was put through the crevice of a door to the defendant, who had locked himself in: Smith v. Wintle, Barnes, 405; where the writ had been enclosed in a letter to defendant, which he had read, and from which he took out the copy: Boswell v. Roberts, Barnes, 422. See also Aldred v. Hicks, 5 Taunt. 186; but see the later case of Redpath v. Williams, 3 Bing. 443.

> Where, the door of the defendant's house being fastened, the officer spoke to him through the closed window, explaining the nature of the process, and then placed a copy of it under the door informing defendant thereof, after which he returned to the window and showed the original summons to defendant, who said, "That will do": In re Colin Campbell, 9 C. L. T. 145.

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Service upon the treasurer was held good service upon the county: section Watts v. Beemer, 8 C. L. T. 255 per Wilkes Dy. J.

If the particulars of demand should be amended after service, judgment could not be entered without re-serving the summons; Guess v. Perry, 12 P. R. 460.

If a person refuses to take a copy of the summons, the proper course is to inform him of its nature, and throw it down in his presence: per Patteson, J., Thomson v. Pheney, 1 Dowl. 443.

In Goggs v. Huntingtower, 12 M. & W. 503, the facts were these. In order to serve defendant, a person went three times to his residence. when he saw a female servant, who said her master was not at home. On the third occasion the servant let down over the garden wall a basket, into which the writ was put. The servant then took back the basket; and shortly afterwards the voice of the defendant was heard in the yard, saying to the servant, "Take it back; I will not have it." The party called on a subsequent day, when the servant said she had given the writ to her master. Held, not a personal service. In Christmas v. Eicke, 6 D. & L. 156, the facts were these. Several calls had been made at defendant's residence by the party who was endeavouring to serve the writ, without success. On the last occasion, having inquired if the defendant was at home, and having received an evasive answer, he waited in the hall. Having afterwards gone into the parlour for a few minutes, 'he saw the defendant running upstairs. He immediately followed after defendant, but before he could give him a copy of the writ, the defendant went into a room and fastened the door. He then called out to him, and told the defendant that he had a writ against him at the suit of the plaintiff, and, putting a copy of it through a crevice of the door, told him that that was a copy of the writ. Held, not actual personal service, but only constructive service. But see Smith v. Wintle, supra. Service upon "a female servant at the lodgings of the defendant" is not good service: Price v. Thomas, 11 C. B 543. In Heath v. White, 2 D. & L. 40, it wes held that where the party attempting to serve the writ of summons went to the defendant's house, and, seeing him standing at a closed window on the ground floor, told him in an audible voice the purpose for which he came, and threw a copy of the writ down in his sight, and in the presence of his wife, who had come out of the house, and who had denied that he was at home, and left it lying there in defendant's garden, the service was not sufficient. If proceedings be taken as if personal service had been effected when it was not, they are irregular only, and not null (Holmes v. Russel, 9 Dowl. 487), and a defendant must move promptly after knowledge of it to set them aside; see John v. DeVeber, 8 C. L. T. 383; or he will be taken to have waived the irregularity: Willis v. Bull, 1 Dowl. N. S. 303. But where no irreparable wrong will be done, a plaintiff who has obtained judgment by default, lapse of time is not a bar to the application to set it aside: Atwood v. Chichester, 3 Q. B. D. 722. If there are conflicting affidavits as to service, and the party serving has deposed to personal service, the courts will not set aside the proceeding upon an affidavit of the defendant that he has not been served: Morris v. Coles, 2 Dowl. 79; Giles v. Hemming, 6 Dowl. 325; Emerson v. Brown, 7 M. & G. 476. In actions against trading corporations, it is submitted that service could be effected on the president or secretary of the company.

If the bailiff cannot effect the service of the summons, he shall, immediately after the time for service has expired, return the same to the clerk, stating the reason for non-service in writing on the back of the summons: Rule 90. Service may be made at any hour of the day or night: Upton v. Mackenzie, 1 D. & R. 172; Priddee v. Cooper, 1 Bing. 66. The summons may be served in any county in Ontario, and by any bailiff; In re Ladouceur v. Salter, 6 P. R. 305; although not bound to go

outside of his own division: section 51. If served on a Sunday the service is void, and cannot be waived: Taylor v. Phillips, 3 East, 155. Service is good though made while defendant is attending court in his own cause: Poole v. Gould, 1 H. & N: 99; City of Kingston v. Brown, 4 U. C. R. 117. The summons, we need scarcely say, must be served by one who can read so as to be able to swear, if necessary, to the correctness of the copy: Delafield v. Jones, Ca. Pr., C. P. 84. But inability to write is not an objection: Baker v. Coghlan, 7 C. B. 131. Where, in an action against a father, process was served upon his son of the same name, and appearance entered and defence made by the son, the court held that a verdict for defendant was correct, and that, whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father: Killens v. Street, M. T. 4 Vic. A writ directed to J. S. was, by mistake, served upon his son of the same name, who, a few days afterwards, gave it to the father, the defendant telling his son that the sheriff had made a blunder, and defendant at his son's request took it to an attorney, who, upon defendant's instructions, entered appearance, and afterwards put in pleas; it was held good service: The Provincial Insurance Company of Canada v. Shaw, 19 U. C. R. 360. In an action on a mortgage the writ was served on a mortgagor's father, who, by his son, an attorney, entered an appearance and defended the suit, and a verdict was taken against the mortgagor, the verdict was set aside because served on the wrong person, and no notice or knowledge of the proceedings were shewn to have reached the defendant: Sutherland v. Dumble, 14 C. P. 156; see also Walley v. M'Connell, 13 Q. B. 903. An admission of service of summons waives all technical irregularities: Otis v. Rossin, 2 P. R. 48. Where personal service is not necessary, the bailiff should be particular in serving one of the three persons mentioned in this clause, and shewing the nature of the service in the affidavit; and when served on "some grown person, being an inmate of the defendant's dwelling-house or usual place of abode, trade or dealing," his or her name, if possible, should be stated in the affidavit, and the fact that the person was grown up and was an inmate of the particular house, etc.: see Form 106. On these points, see particularly 2 U. C. L. J. 85, 86 and 104, where the mode of service is fully discussed.

It is an uncertain question whether any but a bailiff can serve Division Court process under section 51 of this Act: Whitehead v. Fothergill, Dra. 200. It is submitted, however, that service made by any person is good.

Where the suit is on the judgment of a court of the Province of Quebec, on a personal service made in Ontatio in an action in which the cause thereof arose in Quebec, the judgment is conclusive on the merits: Court v. Scott, 32 C. P. 148, and cases there cited; R. S. O. c. 44, ss. 81, 82.

Whether service of a summons from a Division Court is good is a matter peculiarly for the decision of the Judge: Waters v. Handley, 6 D. & L. 88; Zohrab v. Smith, 5 D. & L. 635; see Robinson v. Lenaghan, 2 Ex. 333.

As to service on a corporation having its head office out of the Province, see sections 101 and 182.

As to service on partners, see section 108, sub-section 4.

If a defendant gives notice of defence, it is submitted that he would thereby waive proof of service or any irregularity of service: Davis v. Pearce, L. R. 5 C. P. 435; In re Jones, 1 L. M. & P. 65.

And if the defendant appears and contests the action at the trial, personal service is also waived: In re Guy v. G. T. Ry. Co., 10 P. R. 372; see also In re Merchants' Bank v. Van Allan, 10 P. R. 348.

General Provisions.

100. Where it is made to appear to the Judge upon Substituaffidavit that reasonable efforts have been made to effect service. personal service of the summons upon the defendant, primary debtor or garnishee, and either that the summons has come to the knowledge of the defendant, primary debtor or garnishee, or that he wilfully evades service of the same, or has absconded, [either before or after the issue of the summons, or is out of the Province of Ontario, but having in Ontario an office and an agent doing business on his behalf the Judge may, by order, grant leave to the plaintiff to serve the writ in such manner, at such place, or upon such person for the defendant, primary debtor or garnishee, as to him may seem proper, and may grant leave to the plaintiff to proceed as if personal service had been effected, subject to such conditions as the Judge may impose. 43 V. c. 8, s. 62, amended by 51 V. c. 10, s. 1, and 52 V. c. 12, s. 10.

Affidavit for substitutional service.—As to formalities and general requirements of an affidavit, see notes to section 86, ante. The affidavit should show one of four things. (1) That reasonable efforts have been made to effect personal service upon the defendant, primary debtor or garnishee; and either that the summons has come to his knowledge; or (2) that he wilfully evades service of the same; or (3) has absconded either before or after the issue of the summons; or (4) is out of the Province of Ontario, but having in Ontario an office or an agent doing business on his behalf.

Reasonable efforts.—It is a common law right, which every defendant has, to be served personally with the summons, and it can only be taken away by statutory enactment: see Thorburn v. Barnes, L. R. 2 C. P. 384; Re Pollard, L. R. 2 P. C. 106; Maxwell on Stats. 2nd ed., 443; Ferguson v. Carman, 26 U. C. R. 26.

"Before any order will be made under this section, the Judge must be satisfied that the process-server has done all that could be reasonably expected of him, to serve the defendant personally, or to ascertain his dwelling place, and the affidavit must shew what those efforts were:" Lush's Prac. 3rd Ed. p. 375.

The affidavit must state what steps have been taken to effect personal service, and that all means to do so have been exhausted: per Kindersley, V.-C., Firth v. Bush, 9 Jur. N. S. 431.

What is meant by "reasonable efforts," must depend on the circumstances of each particular case: per Erle, C.J., Tomlinson v. Goatley, L. R. 1 C. P. 231. "In cases not covered by authority the verdict of the jury or the decision of a Judge, sitting as a jury, usually determines what is reasonable in each particular case:" Etroud, 653.

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The affidavit should shew, as strongly as possible, where the defendant resided or does reside, what business he had been, or was engaged in, what specific efforts were made to effect personal service on him, and why it was not done, and if founded on the fact that the defendant had absconded, the additional fact should be stated, namely, whether or not he had any (and if so, what) friends or relations residing in the province:

see Stephen v. Dennie, 3 U. C. L. J. 69. **See** also Flower v. Allan, 2 H. & C. 688, **per** Bramwell, B., at p. 694.

It would not be enough to shew that a defendant had gone abroad, and had no private residence in this Province; the affidavit should show on the face of it reasonable grounds for inducing the Judge to conclude that he was wilfully evading service or had absconded: Kitchen v. Wilson, 4 C. B. N. S. 483.

What inquiries were made to discover the defendant's residence-should be shown: Nugee v. Swinford, 9, Dowl. 1038.

The calls made by the bailiff to see the defendant should, if possible, unless there was something extraordinary in the circumstances, be made on separate days: Cross v. Wilkins, 4 Dowl. 279; Jamieson v. Wilkins, 2 Dowl. N. S. 331.

The affidavit should shew where the calls were made, and set out with reasonable detail the answers that were given, and by whom, and if they represented the party to have been from home, circumstances must be shewn to falsify the statement, if that is relied on: Price v. Bower, 2: Dowl. 225; Whitehorne v. Simone, 1 C. & J. 402; Smith v. Hill, 2 Dowl. 225; Waddington v. Palmer, 2 Dowl. 7; Houghton v. Howarth, 4 Dowl. 749.

Where, however, there is clear *prima facie* proof that defendant knew of the proceeding and avoided it, these particulars would be unnecessary :: Gibson v. Wilson, 3 Jur. 24.

In the case of Johnson v. Disney, 2 Dowl. 400, the servant, upon being told by the person who went to serve the process, that legal proceedings would be taken, went upstairs, and said, on her return, that hermistress, the defendant, would call and pay the claim, it was held that subsequent proceedings could be taken.

Where defendant's residence could not be discovered, but a copy of the writ had been sent to an address to which letters had been directed, and which defendant had answered, and he had subsequently corresponded with the plaintiff's attorney on the subject of the claim, this was held sufficient on which to found a distringas, though no calls or appointments had been made: Gorringe v. Terrewest, 2 L. M. & P. 12; and which, it is submitted, would be sufficient to obtain an order for substitutional service under this section.

"It is presumed that, where there are two or more defendants an order may be obtained against some of them, though the others have not been served:" Lush's Prac., 3rd Ed., p. 376.

Although the facts may not shew a good personal service, vet they may shew a case where the summons came to the knowledge of the defendant within the meaning of this section: see the cases cited in notes to section 99.

The Judge would not be satisfied with service on an official in the gaol in which a defendant was confined unless there was a reasonable probability that the contents of the summons became known to the defendant: Bland v. Bland, L. R. 3 P. & D. 233.

The process of Division Courts is of no effect against a man residing outside the Province: Ontario Glass Co. v. Swartz, 9 P. R. 252, unless he has, in Ontario, an office and an agent, doing business in his behalf.

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an residing 252, unless his behalf. or has absconded; and where a defendant cannot be served owing to his residence out of the Province, neither can there be substitutional service in such a case. The principle of substitutional service is thus stated in the latest reported case on the subject by Lord Esher, M.R: "I do not see how substituted service can be ordered where the conditions are such that original personal service could not possibly be effected. The expression "substituted service" implies in itself that the original service could, under certain circumstances, possibly be effected: "In re Easy. Ex parte Hill, 19 Q. B. D. 538; see Field v. Bennett, 56 L. J. Q. B. 89; Fry v. Moore, 23 Q. B. D. 395; Hilliard v. Smyth, 36 W. R. 7; Wilding v. Bean, (1891) 1 Q. B. 100.

If substitutional service should be ordered where the defendant was beyond the jurisdiction of the court, unless specially authorized by statute, no valid judgment could be entered thereon: Berkeley v. Thompson, 10 App. Cas. 45. But if substitutional service is properly ordered, judgment entered upon it could only be set aside as if entered on personal service: Watt v. Barnett, 3 Q. B. D. 363.

Formerly if the defendant had, ever since the commencement of the action, been residing out of the jurisdiction, no order could properly be made, and would be set aside if granted: see Hesketh v. Flemming, 1 Jur. N. S. 475, per Coleridge, J.; Naef v. Mutter, 12 O. B. N. S. 816.

But by 51 V. c. 10, s. 1, the section has been amended so as to make it applicable to cases where a defendant has absconded "either before or after the issue of the summons"; and by 52 V. c. 12, s. 10, it is also made applicable to cases where the defendant "is out of the Province of Ontario, but having in Ontario an office and an agent doing business on his behalf."

It is for the Judge to determine whether the facts give him jurisdiction to make the order under this section: and the High Court will not review his decision: Re Hibbitt v. Schilbroth, 18 O. R. 399.

To abscond is to depart to avoid legal process: Wharton; Webster.

An order will not be made where the defendant is a lunatic, and where his relations or keeper have refused admission to him: Ridgway v. Cannon, 2 W. R. 473; Holmes v. Service, 15 C. B. 293; Williamson v. Maggs, 28 L. J. Ex. 5; but if the summons is mentioned to him it would have sufficiently "come to the knowledge" of the defendant, to warrant an order for substitutional service: Kimberley v. Alleyne, 2 H. & C. 223; Raine v. Wilson, L. R. 13 Eq. 576.

Judgment should not, however, be given against a lunatic without first appointing a guardian ad litem: Daniels Ch. Prac. 160; Crawford v. Crawford, 9 P. R. 178; unless a committee has been appointed, and in such case, the committee is a necessary party. If the lunatic is confined in a public asylum, service may be made on the Inspector of Prisons and Public Charities, but it is, nevertheless, necessary to have a guardian ad litem appointed: R. S. O. c. 245, s. 55.

The order is generally Exparte: Barringer v. Handley, 12 C. B. 720. To save delay the application for the order should be made to the Judge in Chambers.

As to the time and manner of moving an application to set aside proceedings improperly taken on substitutional service: see Willis v. Ball, 1 Dowl. N. S. 303; Morris v. Coles, 2 Dowl. 79; Atwood v. Chichester, 3 Q. B. D. 722; Emerson v. Brown, 8 Sc. N. R. 219; Giles v. Hemming, 6 Dowl. 325; Johnson v. Smallwood, 2 Dowl. 588; Williams v. Piggott, 1 M. & W. 574.

The defendant may waive any irregularity by taking any steps in the action after the service: Fry v. Moore, 23 Q. B. D. 395.

Section

Sections 100-101 An application may, it seems, be made to set aside the order on affidavits contradicting those on which it was obtained, and not disclosing any defence on the merits: Hall v. Scotson, 9 Ex. 238; Thelwall v. Yelverton, 16 C. B. N. S. 813.

The plaintiff's proceedings, subsequent to the order, must strictly conform to it, and to the terms which the Judge has imposed: Weeks v. Wray, L. R. 3 Q. B. 212.

If the order was properly granted it would not be rescinded in consequence of an event which subsequently occurred: Borradaile v. Nelson, 14 C. B. 655.

An order properly made could, for good cause, be set aside by the Judge on the merits, and the defendant allowed in to defend, but the Judge could impose terms: Watt v. Barnett, 3 Q. B. D. 183, 363.

The Judge would, by the order, prescribe what is to be done instead of personal service, and, if it appeared that the defendant has absconded, leaving a wife, service on her would probably be made one of the terms of the order: Bank of Whitehaven v. Thompson, W. N. (1877) 45; or that a copy of the summons be left at the defendant's last place of abode or of business: see Cook v. Dey, 2 Ch. D. 218.

Wilfully evades service.—In common parlance, "wilful" is used in the sense of intentional, as distinguished from accidental or involuntary: State v. Clarke, 29 L. J. N. 483.

"Wilful is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing, and is a free agent:" per Bowen, L.J., Re Young and Harston, 31 Ch. D. 174; and it has been said that the legal meaning of "wilfully" is purposely: argument of counsel in Hutchinson v. M. B. & R. Ry. Co. 15 M. & W. 314, citing R. v. Price, 11 A. & E. 727.

Absconded.—"Absconded" means departed to evade legal process. It here means, we submit, having absconded from the Province of Ontario, not necessarily from the Dominion of Canada.

Service of process, etc., on corporation.

- 101. (1) Every summons or process issued out of a Division Court against a corporation, [firm or individual,] not having its chief place of business within the Province, and all subsequent papers and proceedings in the action, or proceeding in which the summons or process has been issued, may be served on the agent of the corporation, [firm or individual] whose office or place of business as such agent is either within the division in which the summons or process issued, or is nearest thereto.
- (2) For the purposes of this section the word "agent" shall be held to include,

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(a) In the case of a railway company a station- Section master having charge of a station belonging to the railway company;

- (b) In the case of a telegraph company, a person having charge of a telegraph office belonging to the telegraph company, and
- (c) In the case of an express company, a person having charge of an express office belonging to the express company. 48 V. c. 14, s. 11, amended by 52 V. c. 12, s. 11.

Corporation, Firm or Individual.—This section was first introduced in 1885, its provisions originally extending only to corporations not having their chief place of business in the Province. Prior to that there was no provision by which, in ordinary actions against such corporations or persons residing out of, but carrying on business within, the Province, service of process could be effected: Re Ahrens v. McGilligat, 23 C. P. 171; Westover v. Turner, 26 C. P. 510; In re Guy v. G. T. R. Co., 10 P. R. 372; Berkley v. Thompson, 10 App. Cas. 45; Ont. Glass Co. v. Swartz, 9 P. R. 252; R. v. Lightfoot, 6 E. & B. 822; although by sections 2, 3 and 4 of the Division Courts Amendment Act, of 1884, provision was made for the service of garnishment proceedings against such corporations. By 52 Vic. c. 12, s. 11, (1889), the provisions of this section was made to include "a firm or individual" having its (sic) chief place of business without the Province.

Chief place of business .- There is not much to be found concerning the legal meaning of the phrase "chief place of business." Nothing exactly analogous to it is to be found in any other part of the Act, but it is unlikely that any difficulty can arise as to the meaning of the term when applied to corporations. It has been held that "the home of a company must be taken to be that place which is occupied as such, where their profits come home to them, whence orders erranate, and where the chief officers of the company are to be found;" per Wilde, B., in Adams v. G. W. Ry. Co., 6 H. & N. 401, at p. 409; and it is submitted that this is also a good general definition of the expression "chief place of business," as applied to a company. See also notes to section 81.

As applied to "a firm or individual," the same definition would, it is submitted, be applicable, and that "the chief place of business" of "a corporation, firm or individual" is that place where the principal operations of the business are carried on, where the profits come home to them, and where the chief offices of the company, or the members of the firm or the individual himself who controls the business are to be found. See notes to sec. 81.

The section appears to extend only to cases where corporations, firms or individuals carry on business outside the jurisdiction, and have a branch establishment of that business within the jurisdiction. In this respect, the Division Courts have larger powers than the High Court: Russell v. Cambefort, 28 Q. B. D. 526; Dobson v. Festi, (1891) 2 Q.B. 92; Heineman v. Hale, (1891), 2 Q. B. 83. A limited agency for taking orders for transposition in the court of the court for transmission, is not a carrying on of business at the agent's office: Grant v. Anderson, (1892), 1 Q. B. 108.

May be served on the agent.—Except in the cases enumerated in 101-103 the sub-sections, it is submitted that "agent," would mean the person managing the branch establishment.

Office or place of business.—The office or place of business must bethat which he occupies as such agent, i.e., the branch establishment.

Nearest thereto. - See notes to section 82.

Sub-section 2 .- The definition which the statute here gives of the word "agent" is not intended to define the only class of agents that. may be served.

A female, married or single, a minor or an alien, could be an agent under this section : see Watkins v. Vince, 2 Stark., 368. See section 185, sub-section 2, and notes thereto for a further discussion of this question.

As to service, see section 99 and notes.

Postages.

102. The postages of papers required to be served out. of the Division, and sent by mail for service, shall be costs in the cause. R. S. O. 1877, c. 47, s. 73.

The costs of all proceedings, "which form part of the regular proceedings in the cause," are generally understood as "costs in the cause;" and the party entitled to costs receives them from the opposite party: Cameron v. Campbell, 1 P. R. 173, per Burns, J.; see also Pugh v. Kerr, 6 M. & W. 17; Copeland v. Blenheim, 11 P. R. 54.

How process, etc., may be executed at a distance.

103. Where there is no bailiff of the court in which the action is brought, or when the bailiff has been suspended by order of the Judge, or where any summons, execution, subpæna, process or other document, is required. to be served or executed elsewhere than in the division in. which the action is brought, it may, in the election of the party, be directed to be served and executed by the bailiff of the division in or near to which it is required to be executed, or by such other bailiff or person as the Judge, or clerk issuing the same, orders, and may, for that purpose, be transmitted by post, or otherwise, direct to such bailiff or person, without being sent to or through the clerk. R. S. O. 1877, c. 47, s. 74; 49 V. c. 15, s. 8.

Issuing the same orders.—At first sight it would appear that the papers: mentioned in this section might be served or executed under its provisions in any county; but by Rule 34 a writ of execution cannot be issued underthis clause to the bailiff of any other Division Court which is not in the same county. The proceedings in the latter case would be by transcript. under section 217.

The bailiff is not, in the absence of order by the Judge or clerk, bound. to serve or execute the documents unless they are to be executed in ornear to his division: Davy v. Johnson, 31 U. C. R. 153.

It will be observed that the bailiff, who acts under the provisions of this section, together with his sureties, is as responsible for his acts as if the proceeding was in his own court. See section 104.

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If an execution is to be executed by any other person than the bailiff sections of the division out of which it issues, the safer practice would be to have 103-105 the Judge's or clerk's order endorsed on the writ.

104. In cases mentioned in the last preceding section Duties of bailiff and it shall be the duty of the bailiff to serve and execute all liability of sureties. summonses, executions, subprenas, process and other documents, and make return thereof with reasonable diligence, and to pay over, on demand, all moneys by him levied or received thereon; and for neglect or default therein, in addition to any other remedy against the bailiff, he and his sureties shall be liable, on their covenant to the parties aggrieved, as if the summonses, executions, subpænas, process and documents had issued from or related to some action in the court of which he is bailiff. R. S. O. 1877, c. 47, s. 75.

Return.—The return must be made to the clerk who issued the process: Rule 34.

Diligence. - No rule can be laid down in this respect. What is "reasonable diligence" must depend on the circumstances in each case: Stroud, 230, 653; see also note to section 100, as to "Reasonable

On demand.—A demand must be made for moneys collected: see Gibbs v. Southam, 5 B. & Ad. 911. See note to section 35, title, "Scope of the Covenant."

Other documents.—As to service of summonses, subpœnas, process and other documents, see notes to section 99.

105. The clerk shall prepare affidavits of service of all Clerk to summonses issued out of his court, or sent to him for ser-affidavits of service, vice stating how the same were served, the day of service, etc. and the distance the bailiff necessarily travelled to effect service, and the affidavits shall be annexed to or indorsed on the summonses respectively; but the Judge may require the bailiff to be sworn in his presence, and to answer such questions as may be put to him touching any service or mileage. R. S. O. 1877, c. 47, s. 76.

Affidavits of service of all summonses.—The duty here imposed on the clerk is imperative. For the necessary formalities of all affidavits, see Rule 133.

We need scarcely remark upon the necessity for the clerk's observing care in the preparation of all affidavits: see Jacomb v. Henry, 13 C. P. 377. If the affidavit of service of any process should be defective, it could be amended and re-sworn. It would not invalidate the service if properly made. The act itself being properly done, the proof of it,

Sections though defective, would not invalidate the service. A fresh affidavit could be made: see Fee v. McIlhargey, 9 P. R. 329, where it was held that the Division Court Rules are not imperative.

> Distance necessarily travelled .-- If less than a mile, mileage is not chargeable, for the tariff only provides for "every mile" necessarily travelled. If the distance travelled is greater than any given number of miles, and not as much as the next succeeding number, the part of a mile travelled is not to be reckoned. Mileage should be calculated from the point at which the officer received the paper. If two or more defendants, the mode of determining the distance travelled is by estimating it first to the place where the first defendant is served, then from there to the next. and so on; and the aggregate distance so travelled is the correct measure. It would be improper to charge mileage to each defendant's place: Corporation of Haldimand v. Martin, 19 U. C. R. 178.

Partners.

One of several partners may be sued in certain **Cases.**

106. In case of a debt or demand against two or more persons, partners in trade or otherwise jointly liable, but residing in different divisions, or one or more of whom cannot be found, one or more of such persons may be served with process, and judgment may be obtained and execution issued against the person or persons served, notwithstanding others jointly liable have not been served or sued, reserving always to the person or persons against whom execution issues his or their right to demand contribution from any other person jointly liable with him. R. S. O. 1877, c. 47, s. 77.

Debt or demand.—This section is confined in its operation to debt. and demands. It would not extend to claims for tort. As between to feasers there is no right of contribution: Corporation of Vespra v. Coo , 26 C. P. 182; Willcocks v. Howell, 8 O. R. 576.

Set-off.—Defendant may avail himself of any set-off he would be entitled to if all the persons liable were made defendants.

Jointly liable.—A judgment, under this section, against one or more several joint debtors, even without satisfaction, is a bar to any action against the others: King v. Hoare, 13 M. & W. 494; but not where the debt is joint and several: Ib.; Vestry of Bermondsey v. Ramsey, L. R. 6 C. P. p. 251, per Montague Smith, J. See also 36 Alb. L. J. 245, 265. But a partnership debt is not joint and several, but merely joint: Kendall v. Hamilton, 4 App. Cas. 504, 516.

Where one or more only of several joint-debtors is sued in a Division Court, he can set up the non-joinder of the other co-debtors, except where the defendants reside in different divisions, or where one or more of them cannot be found.

If judgment be taken against one or more joint-debtors, it cannot be set aside even with the consent of the jndgment debtor so as to evade the rule making it a bar against the others: Hammond v. Schofield, (1891), 1 Q. B. 453; Toronto Dental Manufactory Co. v. McLaren, 14 P. R. 39. affidavit was held

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Contribution .- "Contribution" here means the performance by each Sections of two or more persons, jointly liable, by contract or otherwise, of his share of the liability: Wharton, 177. Where a note, however, was payable in instalments it was held that one surety who paid an instalment was entitled immediately to contribution from the others: Re Macdonald, W. N. (1888) 130. It frequently arises between sureties. See notes to section 35, title, " Scope of the Covenant."

A defendant or co-surety cannot compel an assignment to be made to him of the judgment by the plaintiff, unless the whole of the debt has been paid: In re McLean v. Jones, 2 L. J. N. S. 206; Ewart v. Latta, 4 Maq. H. L. C. 983; see also Brown v. Gossage, 15 C. P. 20. The right to an assignment can only be enforced by action: Phillips v. Dickson, 8 C. B. N. S. 391; but even without assignment, the rights of the creditor are possessed by the party who pays him; Re McMyn, Lightbown v. McMyn, 33 Ch. D. 575; but cannot be enforced in the name of the creditor without an indemnity: Potts v. Leask, 36 U. C. R. 476; and where defendants are partners, and one of them pays the debt, he can only enforce the judgment to the extent that anything may be found due to him on the taking of accounts between them: London & Can. L. & A. Co. v. Morphy, 14 A. R. 577; Honsinger v. Love, 16 O. R. 170.

107. Where judgment has been obtained against such Balliff may partner, and the Judge certifies that the demand proved was perty of a strictly a partnership transaction, the bailiff, in order to or Judge. satisfy the judgment and costs and charges thereon, may seize and sell the property of the firm, as well as that of the defendants who have been served. R. S. O. 1877, c. 57, s. 78.

This section authorizes the sale of the interest of a person against whom judgment has not been recovered. It must, therefore, be construed strictly. The Judge should certify the fact that the demand for which he gives judgment has been proved to be "strictly a partnership transaction of the firm of X. & Y." It would be safer also to have such a certificate endorsed on the execution as a justification for the bailiff. Every member of the partnership has apparent authority to do for the firm whatever is necessary for the transaction of its business in the way in which that business is ordinarily carried on by other people: Lindley on Part. 124, 169. This section, however, requires more than apparent authority. The transaction must be strictly one of the partnership.

Without the aid of this section, the bailiff could, on an execution against one of two partners, seize the goods of both, but only sell the debtor's undivided interest in them: Johnson v. Evans, 7 M. & G. 240; Lee v. Rapelje, 2 U. C. R. 368; Helmore v. Smith, 35 Ch. D. 436; Harrison v. Harrison, 28 L. J. N. S. 216; but he could not take the goods out of the other partner's possession: Burnell v. Hunt, 5 Jur. 650.

The section extends only to actions of debt or demand where partners reside in "different divisions or one or more cannot be found:" see section 106, incorporated herein by the word "such": see Eastern Counties Ry. Co. v. Marriage, 6 H. & N. 931; Pearson v. Ruttan, 15 C. P. 89.

Adding Parties.

Adding defendants.

- 108. The following previsions shall apply to and in respect of any action brought in a Division Court;
- 1. The Judge may, at any time after action commenced, upon the application of either party, and upon such terms as may appear to him to be just, order that the name of any party who ought to have been joined in the action as a defendant [primary debtor or garnishee] shall be added as a party defendant [primary debtor or garnishee].
- 2. If it shall appear to the judge, either before or at the trial of an action, that any party ought to be added as a party defendant [primary debtor or garnishee] in order that the Court may settle all rights and questions involved in the action, the Judge may order such person to be added accordingly.

Service on parties. added. 3. Every person whose name is so added as a defendant [primary debtor or garnishee] shall be served with a copy of the writ of summons, the original summons being first properly amended, and the proceedings against such added defendant [primary debtor or garnishee], shall be deemed to have been commenced from the date of the order making him a party defendant [primary debtor or garnishee]; but if the application to add a defendant [primary debtor garnishee] be made at the trial, the Judge may make the order in a summary manner, and may dispense with the service of a copy of the summons upon such defendant [primary debtor or garnishee], if such defendant [primary debtor or garnishee] or his solicitor consent thereto, upon such terms as to costs or an adjournment of the trial, as to the Judge shall appear just.

Service on partners. 4. Any two or more persons claiming, or being liable as co-partners may sue, or be sued in the name of the respective firms, if any; where partners are sued in the name of their firm, the summons may be served on one or more of the partners and subject to the provisions in the next two

sub-sections contained, such service shall be deemed good "ec' ton service upon the firm; but the affidavit of the service of the summons shall state the name of the partner served. Any party may, at any time before or after judgment, apply to the Judge for an order directing a statement to be furnished of the names of all the persons who are copartners in any firm which is a party to the action by the firm named.

- 5. Where a judgment is against partners in the name of Execution the firm, execution may issue in the manner following:-
 - (a) Against any goods of the partners.
 - (b) Against the goods of any person who has admitted in the notice of dispute or defence filed that he is or who has been adjudged a partner.
 - (c) Against any person who has been served as a partner with a copy of the summons and who has failed to appear.

6. Upon the trial of an action against a firm, if the Adding plaintiff is desirous of obtaining a judgment against the ants. individual partners, other than the one served with a copy of the summons, and in addition to his judgment against the firm, he may procure the addition of the remaining partners as defendants under sub-sections 1 and 3 of this section, and thereafter proceed to judgment against them in the action as in other cases. 49 V. c. 15, s. 21, amended by 52 V. c. 12, s. 12.

Adding parties.—Before this provision was made there appeared to be no power in cases in the Division Court to add a party defendant: Barber v. Bingham, 20 L. J. N. S. 65; Building & Loan Assn. v. Heimrod, 19 L. J. N. S. 254. Now, if the Judge considers that it is necessary for the purpose of settling all rights and questions involved in the action that any person or persons should be added as defendant or defendants, or as primary debtor or garnishee, it is his imperative duty to make all necessary amendments for that purpose. Where one joint contractor is sued, he has, subject to the provisions of section 106, the right to have his co-contractor joined as defendant: Kendall v. Hamilton, 4 App. Cas. 504; Pilley v. Robinson, 20 Q. B. D. 155; Robb v.Murray, 13 P. R. 397.

At any time after action commenced.—The summons should first be properly amended if the application is made before the trial and such application allowed. In such case the summons must be served on the added defendant, and he would have the same rights of defence and time

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therefor that he would have had if the action had been commenced against him on the day the Judge's order adding him as a defendant was made. Should there be no application made before the trial, but the order was applied for at the trial, the Judge could make the order in a summary manner and dispense with service of the summons on the defendant so added, provided he or his solicitor should consent thereto. The costs of amendment and postponement of the trial are left in the discretion of the Judge. A defendant could not properly be added on an ex parte application: Tildesley v. Harper, 3 Ch. D. 277. An administrator or executor of one of several defendants could be added: Ashley v. Taylor, 10 Ch. D. 768. The object of the statute is that all rights and questions involved in the action should be settled.

If the action as against the added defendant would be barred, at the time of the amendment, by any Statute of Limitations, he may rely on that defence.

Sub-Sec. 4.—The provisions of the Act allowing proceedings by or against firms enable the name of the firm to be used only when they sue or are sued.

It is improper, therefore, to use a firm name when co-partners are proceeded against as garnishees: Walker v. Rooke, 6 Q. B. D. 631.

The provisions enabling the firm name to be used have caused much difficulty both in England and in this province. In Wilson v. Roger, McLay & Co., 10 P. R. 357, Osler, J.A., said: "With the system of registration of co-partnerships which prevails with us I must say that I fail to see the usefulness or convenience, in our practice, of these rules which relate to suing co-partners in the firm name. The occasions must be rare in which a plaintiff can have any difficulty in suing the individual members of the firm."

The provisions are, primarily, taken from the Scotch law: see-Bullock v. Caird, L. R. 10 Q. B. 276.

Where a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm, in truth, sues them individually just as much as if he had set out all their names: per Lindley, L.J., Western National Bank v. Perez, (1891), 1 Q B. 314; but unless he sues them all as partners, he is not entitled to judgment against them individually: sub-sec. 5; Standard Bank v. Frind, 14 P. R. 355. To take advantage of the provisions, it is necessary that the co-partners should be sued in their firm names. To sue "A. B. and C. D. trading as B. & D." would entitle the plaintiff to judgment against A. B. and C. D., but not against the firm as such; and if there should be an undisclosed partner, he would be discharged: Munster v. Cox. 10 App. Cas. 680. Where the firm is sued, judgment. must be against the firm: Jackson v. Litchfield. 8 Q. B. D. 474; Adam v. Townend, 14 Q. B. D. 103; and no judgment by default can be signed against the firm until the full time has elapsed for each partner served to put in a defence : Alden v. Beckley, 25 Q. B. D. 543. If one partner files a disputing notice, disputing his liability, judgment cannot be given against the firm till after trial, though the other partners may have been served and are in default: Ib. Where the firm has been dissolved, the firm name may, nevertheless, be used: Wilson v. Roger, McL vy & Co., 10 P. R. 355, and if one partner has retired, and the same firm name is still used, it is a question of fact who was intended to be sued: Davis v. Morris, 10 Q. B. D. 436; see Ex parte Young. Re Young, 19 Ch. D. 124.

The English rules have been held to be inapplicable to foreign firms: Russell v. Cambefort, 23 Q. B. D. 526; Western National Bank v. Perez, (1891), 1 Q. B. 304; Indigo Co. v. Ogilvy, (1891), 2 Ch. 31; Dobson v.

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Judgment against a firm does not authorize execution against a partner not served, unless he has admitted in the notice of dispute or defence that he is "a partner or unless he has been adjudged a partner." An adjudication may be obtained by adding such partner as a defendant at the trial, and serving him with the amended summons: see sub-section 6. Such adjudication cannot be obtained summarily; Standard Bank v. Frind, 14 P. R. 355: see Tennant v. Manhard, 12 P. R. 619, which must be treated as overruled. It is submitted that if judgment is obtained by default against the firm, a summons might be issued by the clerk calling upon any partner, against whom execution is desired, to appear at any sittings of the court upon an application that he be adjudged a partner. A judgment summons should not be issued to a partner against whom execution cannot issue: Re Young, 19 Ch. D. 124. In England, however, the County Court Rules of 1892; Order xxv, Rule 6, now provide for the issue of such summons upon an affidavit that such party is a member of the firm.

No person can be adjudged a partner, under this section, unless he be in truth such. Mere holding out will not be sufficient: Re Young v. Parker, 12 P. R. 646. Judgment against the firm destroys all liability of a person who would otherwise be liable as a nominal partner: Scarf v. Jardine, 7 App. Cas. 345. A judgment creditor is not bound to use against the members of the firm, the special remedies given by this section. He may sue them upon the judgment: Clark v. Cullen, 9 Q. B. D. 355.

A number of persons, unincorporated, doing business in a corporate name, may be sued under this section: Escott v. Gray, 39 L. T. N. S. 121.

No power to sue in the firm name is given to a person who is carrying on business under a partnership style: Mason v. Mogridge, 8 T. L. R. 805.

And under the Division Courts Act no power is given to sue a person who carries on business in the name of a firm, there being no provision similar to C. R. 318.

JUDGMENT BY DEFAULT WHERE SPECIALLY INDORSED SUMMONS.

109. (1) In actions brought in a Division Court for the In proceeding recovery of any debt or money demand, where the particuby special summons lars of the plaintiff's claim, with reasonable certainty and detail, are indorsed on or attached to the summons, and a entered by the clerk, copy of the summons and particulars, with a notice in the when claim not disform prescribed by the General Rules or Orders relating to puted, etc.

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Section Division Courts from time to time in force, annexed to or endorsed on such copy, has been duly served, then, unless the defendant has left with the clerk, within eight days after the day of service (where the service is required to be ten days before the return), or within twelve days after the day of service (where the service is required to be fifteen days or twenty days before the return) a notice to the effect that he disputes the claim, or some part, and how much thereof, final judgment may be entered by the clerk on the return of such summons, or at any time within onemonth thereafter for the amount claimed in such particulars or so much thereof as has not been disputed, if the plaintiff is content with judgment for such part; and execution may afterwards issue thereon at the instance of the plaintiff.

Summons particulars be filed.

(2) The final judgment so entered may be in the form and amidavit to prescribed by the General Rules or Orders relating to Division Courts from time to time in force, but no such judgment shall be so entered until the summons and particulars, with an affidavit of the due service of both, have been filed.

Judge may set aside

(3) The Judge may set aside such judgment, and permitjudgment, the case to be tried, on sufficient grounds shown, on such terms as to costs and otherwise as he thinks just. R. S. O. 1877, c. 47, s. 79.

> Debt or money demand .- A "debt" has been defined to be: "whatever one owes:" Rodman v. Munson, 13 Barb. 197; also: "That forwhich an action of debt will lie-a sum of money due by certain and express agreement. In a less technical sense, any claim for money; in a more enlarged sense, any kind of a just demand:" New Haven Saw Mill Co. v. Fowler, 28 Con. 108; and a "demand" has been defined as: "Any account upon which money or other thing is, or is claimed to be, due:" per Dixon, C.J., in Stringham v. Supervisors, 24 Wis. 600. The words used here, "any debt or money demand," have not, so far as the writer is aware, been defined in any reported case. But the following may, in the absence of a better, be an appropriate definition. Any claim, legal or equitable, on contract express or implied, on which a certain sum of money, not being unliquidated damages, is due and pay-

> An action for a debt not due would not come within these provisions. Nor an action on a bond with a penalty for doing anything but payment of money: Griswold v. B. B. & G. Ry. Co., 3 U. C. L. J. 115. Nor a claim for unliquidated damages; Jones v. Thompson, 1 E. B. & E. 63; Dresser v.

Johns, & C. B. N. S. 429; Bank of Toronto v. Burton, 4 P. R. 56; Boyd v. Haynes, 5 P. R. 15; nor an unsettled balance between partners: Campbell v. Peden, 3 U. C. L. J. 68; nor a claim partly for liquidated and partly for unliquidated damages: Rogers v. Hunt, 10 Ex. 474; Westlake v. Abbott, 4 U. C. L. J. 46; nor an action for not returning goods let to hire: Collis v. Groom, 3 M. & G. 851, per Tindal, C.J.; nor an action on a covenant in a lease for unascertained damages: Gowanlock v. Mans, 9 P. R. 270; nor money held by an executor on sale of property of his testator: Soules v. Soules, 35 U. C. R. 334; nor an action for breach of covenant for title: Kavanagh v. Corp. of Kingston, 39 U. C. R. 415; nor an action for arrears of alimony during the pendency of the suit: Bailey v. Bailey, 18 Q. B. D. 855.

The following causes of action, it is submitted, would come within the provisions of the section: any sum of money certain payable under any covenant, money bond, or parol agreement; any cause of action which, in the higher courts, would formerly have been declared for as money payable for goods sold and delivered; goods bargained and sold; work done; money lent; money paid; money had and received; interest upon money; accounts stated; lands sold and conveyed; use and occupation; rent; money payable on bills of exchange and promissory notes; on an award; the price of shares or stocks sold; freight; hire of goods; on a guarantee for the payment of a sum certain; carriage of goods; board and lodging; agistment of cattle or horses, etc.; premiums of insurance or assessments made by Mutual Ins. Co.'s.; medical or other attendance; on a penal statute when jurisdiction not excluded: Brash qui tam v. Taggart, 16 ('. P. 415; on an interim insurance receipt : Kelly v. The Isolated Risk & F. F. Ins. Co., 26 C. P. 299; in cases where damages liquidated; good will of premises; a judgment in the Division Court; and that the latter case is not open to the objection raised in McPherson v. Forrester, 11 U. C. R. 362, and Donnelly v. Stewart, 25 U. C. R. 398, and could be sued under this section; Hodsoll v. Baxter, E. B. & E. 884; Dick v. Tolhausen, 4 H. & N. 695. See sec. 210.

A claim for an account stated with interest would be within the section: Smart v. N. & D. R. Ry. Co., 12 C. P. 404; see Northern Railway Co. v. Lister, 4 P. R. 120. If interest is claimed the particulars should either state the amount or the date from which it is claimed; Bardell v. Miller, 7 C. B. 753. The rate of interest need not be stated unless above six per cent: see Allen v. Bussey, 4 D. & L. 430. Interest should only be claimed when recoverable by contract either express or implied: Inglis v. Wellington Hotel Co., 29 C. P. 387; McKenzie v. Harris, 10 U. C. L. J. 213; or upon a contract in writing where the money is payable at a time certain or where there has been a demand for payment with notice that interest would be claimed: London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co., (1892), 1 Ch. 120; R. S. O., c. 44, ss. 85, 86. A claim of interest in the summons or particulars would be an insufficient demand: Rhymney Ry. Co. v. Rhymney Iron Co., 25 Q. B. D. 146.

It was doubted in Green v. The Ham. Pro. Loan Co., 31 C. P. 574, whether surplus money in the hands of a mortgagee aftersale of land was a purely money demand, but it has been since held that such money was in the nature of an equitable cause of action for money had and received: Legarie v. The Canada L. & B. Co. 11 P. R. 512. See also Reddick v. Traders Bank, 22 O. R. 449. A claim by a partner against the other members of the firm for his share of a sum of money received by the other partners, is a purely money demand, though it may be necessary to take the whole partnership account: Allen v. Fairiáx Cheese Co., 21 O. R. 598.

A judgment of another provincial court would be suable under the words used here: Henderson v. Henderson, 6 Q. B. 288; or a judgment

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Section of any Court of Record: Hutchinson v. Gillespie, 11 Ex. 798; or the judgment of a foreign Court: Grant v. Easton, 13 Q. B. D. 302.

> Reasonable certainty and detail.—This contemplates that each item of the claim should be given with the dates, so far as reasonably can be done. Such particulars should be given as to disclose clearly to the defendant exactly for what he is being sued, and so that if any future action were brought he would be able to shew that the matter in question had already been adjudicated upon: Lucas v. Ross, 9 P. R. 251.

Duly served.—See notes to section 96 and 99.

Within eight days.—The day of service is not to be reckoned: see notes to section 86; see also Kennedy v. Purcell, 14 S. C. R. 453, as to computation of time. The Judge would not have power to extend this time. No power is given him by the statute to do so, and he would have no authority otherwise: R. v. Murray, 27 U. C. R. 134; R. v. G. W. Ry. Co., 32 U. C. R. 506. But he could allow a defendant in to defend under section 112 (see notes to that section), or sub-section (3) of this section.

Left a notice.—All notices under this Act must be in writing: see section 93.

The return of such summons.—That is when the time required to elapse under sections 96 and 97 has expired, viz., ten days, when the defendant resides within the county, and fifteen days when he does not.

Within one month.—This means within one calendar month: Interpretation Act, s. 8, s-s. 15. See notes to section 40; see also Rule 31.

Judgment for such part.—If the summons is issued for such a claim as the law prescribes, and is duly served, judgment may be entered by the Clerk on the summons and particulars of claim upon an affidavit of due service thereof having been filed with him. The judgment may either be for the full amount, if not disputed, or, if a part only is not disputed, then, if the plaintiff so wishes it, for such part. We think a final judgment for a part would be a bar to a subsequent action for the balance of the claim: Winger v. Sibbald, 2 A. R. 610; see Rules 21-23 inclusive.

A plaintiff may take judgment against one of several defendants served: Rule 22, or such, if several, as have been served: Rule 23. But he cannot then proceed against the others: Rules 24, 27, 28.

In regard to judgment against a defendant or defendants where there are several other defendants, see Rules 18-34.

Execution may issue on judgment under this section forthwith: Rule 149.

Affidavits of the due service of both .- See notes to section 86 and section 105, also Rule 133; For this affidavit see Form No. 107. If judgment should be signed on an insufficient affidavit it might be set aside for irregularity: Levy v. Wilson, 9 L. J. N. S. 191; but see Potter v. Pickle, 2 P. R. 391; and the clerk might possibly be liable as a trespasser: Carey v. Lawless, 13 U. C. R. 285; Roissier v. Westbrook, 24 C. P. 91; Codrington v. Lloyd, 8 A. & E. 449.

A judgment can be signed on a holiday: Bennett v. Potter, 2 C. & J. 622; but not on a non-judicial day: Harrison v. Smith, 9 B. & C. 243.

On sufficient grounds shewn.—The authorities shew that a mere general affidavit of merits would not meet the requirements of this section: Whiley v. Whiley, 4 C. B. N. S. 653; Anderton v. Johnston, 8 U. C. L. J. 46; McDonald v. Burton, 2 L. J. N. S. 190; Wooster Coal Co. v. Nelson, 4 P. R. 343; See Hopton v. Robertson, W. N. (1884) 77; Farden v. Richter, 23 Q. B. D. 124; and that, properly, as full an affidavit is necessary as would be required to defeat a motion for immediate judgment under section 111: Dobie v. Lemon, 12 P. R. 64.

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Defendant should also account for his not putting it. a notice in time: per Cotton, L.J., Atwood v. Chichester, 3 Q. B. D. 725; and especially if a trial has been lost: 4 U. C. L. J. 69.

But the Judge will let the case go to a trial if the merits are in dispute, as shown by the affidavits: Wilson v. Mun. Council of Port Hope, 10 U. C. R. 405; Wooster Coal Co. v. Nelson, 4 P. R. 343; Reynolds v. Gallihar Gold Mining Co., 8 C. L. T. 17.

It is suggested that a proper form of affidavit would be, in the case of the defendant making the affidavit thus: "I am advised and verily believe that I have a good defence to this action upon the merits;" and in the case of his solicitor or agent: "The defendant has, as I am informed (or instructed) and verily believe, a good defence to this action upon the merits:" and in both cases shewing the facts or some fact, constituting such good defence. "He need not set out the whole defence with minute particularity:" per Cockburn, C.J., 4 C.B. N. S. at p. 659.

The affidavit must apply the defence to the particular action, by stating that the defendant has a good defence "herein," or in "this cause," or "in this action," on the merits: Tate v. Bodfield, 3 Dowl. 218; Lane v. Isaacs, 3 Dowl. 652; McGill v. McLean, 1 Cham. R. 6.

It should be made by the defendant, his solicitor or agent, or some person who has been concerned in the cause, in such a way as to make him acquainted with the merits: Rowbotham v. Dupree, 5 Dowl. 557.

In setting aside a regular judgment the court considers the statute of limitations a meritorious defence: Maddocks v. Holmes, 1 B. & P. 228; McIntyre v. Canada Co., 18 Gr. 367; Seaton v. Fenwick, 7 P. R. 146; Dobie v. Lemon, 12 P. R. 64. And also infancy: Delafield v. Tanner, 1 Marsh, 391.

Nor would the court refuse to set aside a regular judgment though bankruptcy was going to be pleaded: Evans v. Gill, 1 B. & P. 52.

In an action on a solicitor's bill, the non-delivery of a signed bill, is not a defence on the merits: Beck v. Mordant, 2 Bing. N. C. 140, nor is a set-off: Anderton v. Johnston, 8 U. C. L. J. 46.

A judgment should not be set aside to allow a defendant to set up matters subsequent to it: Schofield v. Bull, 3 U. C. L. J. 204.

The truth of the merits shewn by defendant's affidavit cannot be inquired into: Blewitt v. Gordon, 1 Dowl. N. S. 815; but see 10 U. C. R. 405; and if contradicted by documents signed by defendant, he will be required to bring money into court: Richardson v. Howell, 8 T. L. R. 445.

Where the summons in an action against a firm was served upon the firm, and five days afterwards was served upon an alleged partner, and judgment by default was signed against the firm; subsequently to the signing of the judgment, but within eight days after the service of the writ upon him, an appearance was entered by the partner: Held, that he was entitled to have the judgment against the firm set aside: Alden v. Beckley & Co., 25 Q. B. D. 543.

Terms as to costs or otherwise.—The plaintiff should be placed as nearly as possible in the same situation as though the action had proceeded in the usual way: Smith v. Blundell, 1 Chitty, 226.

The terms commonly imposed have been the payment of the costs: Sisted v. Lee, 1 Salk. 402; Westlake v. Abbott, 4 U. C. L. J. 46, pleading without delay; and sometimes bringing money into Court: see Watt v. Burnett, 3 Q. B. D. 183; Wade v. Simeon, 18 M. & W. 647; Every v. Wheeler, 3 U. C. L. J. 11. See McGregor v. Harris, 9 C. L. T. 504;

Section 109 Sections 109-110 Wright v. Mills, 60 L. T. N. S. 887, but payment into court should not be ordered, unless it would be justified on a motion made under section 111: Dobie v. Lemon, 12 P. R. 64.

So long as a regular judgment remains it can be enforced: Tait v. Harrison, 17 Gr. 458.

Where the plaintiff has obtained judgment irregularly the defendant is entitled ex debito justitiæ to have such judgment set aside; and the court has only power to impose terms upon him as a condition of giving him his costs: per Fry and Lopes, L.J. J., reversing the decision of the Q. B. D., Anlaby v. Prætorius, 20 Q. B. D. 764.

If defendant does not first comply with the terms of the order imposed on him he cannot take advantage of it.

An order setting aside proceedings must be served forthwith; otherwise the opposite party may treat it as abandoned: Molson's Bank v. Dillabaugh, 9 C. L. T. 488, 13 P. R. 312.

It is submitted that a judgment should only be set aside on notice or summons to shew cause: R. v. Chester Lines Com. L. R. 8 Q. B. 344, and cases there cited; but when the time has expired and no judgment entered, and application is made under section 112, the order ought to be ex parte.

Mere lapse of time is not necessarily a bar to an application to set aside a judgment by default, and when no irreparable wrong will be done a plaintiff, the jndgment may be set aside unconditionally: Atwood v. Chichester, 3 Q. B. D 722.

Within one month.—If the clerk does not enter judgment within one month, an alias summons is necessary: (Form 22) Rule 31, which must be dated on the day it actually issues: Rule 14.

Judgment ment not entered.

110. When due proof is made by affidavit or otherwise by default of the service of a special summons issued under the pre-100, where final judg-ceding section of this Act, and of particulars of the plaintiff's claim or demand as required by the said section, and final judgment has not been entered under the provisions thereof, the Judge may, if the defendant does not, in person or by agent, appear in open court, pursuant to and as required by the summons, give judgment against the defendant by default, without requiring proof of the plaintiff's claim or demand, and with the same consequences and effect as if the plaintiff had proved his claim or demand in open court. 48 V. c. 14, s. 3.

> Due proof .- "Duly" means, "In due manner; regularly; legally; in the proper way; according to law:" See Gibson v. People, 5 Hun. 543; Anderson, 385. The expression "due proof" here used must mean the sworn statement, in proper form, of such facts as in law shew that proper service of the summons has been made. Where a person's property may be affected by a proceeding taken in his absence, it is important that all necessary precedent facts should clearly appear.

> Due proof of the service must be made by affidavit or otherwise. For form of affidavit, see Form No. 107.

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The name of the court and style of causes should appear in the affidavit of service: Rule 133; Allman v. Kensel, 3 P. R. 110; Swift v. Jones, 6 U. C. L. J. 63; Hart v. Ruttan, 23 C. P. 613; In re Sharpe, 2 Ch. Cham. 67; McDonald v. Cleland, 6 P. R. 289; Scott v. Mitchell, 8 P. R. 518.

But the Judge may receive the affidavit notwithstanding these defects: Rule 133.

If endorsed on the summons, the style of court and cause need not be given: Form 107.

The affidavit need not contain anything more than the statute or Rules require: Baldwin v. Benjamin, 16 U. C. R. 54.

It would be good though it should state that service was made on the day of a certain month "instant" without stating the year: R. v. Tomb 4 U. C. R. 177.

As to proof of identity of party served, see Young v. Leng, 2 West. L. T. 148.

As to whom affidavits may be taken before, see section 143.

As to the requisites of affidavits generally, see notes to sections 86, 143.

As to requisites of service, see notes to section 99.

It is submitted that the words "or otherwise" only mean that the facts may be proved by oral testimony or other legal proof of the fact of service: Caird v. Fitzell, 2 P. R. 262; Davis v. Pearce, L. R. 5 C. P. 435; and would not justify a judge in acting on anything less than that. As remarked by Cotton, L.J., Shelford v. L. & E. C. Ry. Co., 4 Ex. D. at p. 319: "The words 'or otherwise' mean by any other evidence to which the court can look."

The formalities required on service of the summons are set forth in section 99 and notes thereto. As to service on partners, see section 108, sub-section 4.

The time of service is regulated by the 96th and 97th sections of this Act.

Special summons.—The summons referred to is that for which provision is made under section 94. See notes to that section and also to section 95. Proof is not only required of the service of the summons, but of the particulars of the claim or demand as well.

As to what actions are the subject of special summons, see section 109 and the notes thereto. A special summons is to be issued in all proper cases, unless otherwise ordered by the plaintiff: Rule 79. The Judge may amend at any time a wrong form of summons: Rule 104.

Particulars of the plaintiff's claim.—See notes to sections 94, 95.

Frequently claims are entered as, "To balance of account rendered." This is not a compliance with the statute or Rules of Court, and it is submitted that a Judge should not give judgment under this section on such particulars: Wilkes v. B. B. & G. Ry. Co., 2 U. C. L. J. 230; Villeneuve v. Wair, 12 P. R. 505; see Smart v. N. & D. R. Ry. Co., 12 C. P. 404.

The rendering of an account, simply, in ordinary transactions, not between merchant and merchant, and unreplied to, does not constitute evidence of a complete admission of debt. In connection with other circumstances it may be some evidence, but not of itself sufficient. But even then, the account rendered should be produced, or secondary evidence thereof given.

The Judge may.—Ordinarily the word "may," when applied to the duties of judicial officers, is construed as imperative—as giving a power—and not merely a discretion, which power must be exercised upon proof of the facts calling for its exercise: Macdougall v. Paterson, 11 C. B. 755; R. v. Bishop of Oxford, 4 Q. B. D. 525; Cameron v. Wait. 3 A. R. 194, per Harrison C. J.; Aitcheson v. Mann, 9 P. R. 473. Whether that rule of statutory construction could be invoked here admits of doubt. There might be good reason for a Judge refusing to give judgment in the absence of the defendant or of any one on his behalf. A claim beyond the jurisdiction of the court would, of course, furnish a case in point. But there are others, of which the same may be said. Claims for extortionate interest, or otherwise of doubtful character, should not be the subject of judgment by default, if the Judge questioned their correctness or had doubts of their honesty. We think in such cases he could refuse judgment by default and call for proof of the claim: see Parker v. Brand, 7 T. L. R. 462.

It is submitted that the rule for a Judge to observe in acting under this section is not to incline to a laxity of practice in giving judgment by default on the one hand, nor on the other hand arbitrarily to require proof of the claim by the plaintiff, but to mete out justice by not unnecessarily inconveniencing a plaintiff by requiring proof, nor do injustice to the defendant by a too hasty disposition of the case.

If the defendant does not appear in open court.—The expression "in open court" is evidently intended to mean a visible appearance of the defendant in court, personally or by an agent, and not the technical appearance, which a notice of dispute has been thought to imply.

The expression "in open court" as used to the English Debtors Act, 1869, has been held to mean "what anyone would take to be a court, with the usual accompaniments of the jury box, the witness box, the Judge's seat, and seats for solicitors, counsel and others: "per Coleridge, C.J., and does not include the private room of a County Court Judge, though often used by him for hearing causes: Kenyon v. Eastwood, 57 L. J. Q. B. 455.

If a defendant gives notice disputing plaintiff's claim, and does not appear, the plaintiff would be entitled to his costs, including the costs of subpena or summons to witnesses and service thereof, witness fees and his own expenses as a witness when taxable: Fox v. Toronto & Nipissing Ry. Co., 7 P. R. 157, and other necessary and taxable costs, even of a commission, if costs are awarded by the judgment: Howes v. Barber, 18 Q. B. 588; Fox v. Toronto & Nipissing Ry. Co., supra; Browne v. Smith, 1 P. R. 347; Middleton v. Pollock, 4 Ch. D. 49.

From the nature of proceedings in cases of attachment against absconding debtors, and considering the right of other creditors to intervene under Rule 36, it is submitted that this section would not apply to such cases: See Offay v. Offay, 26 U. C. R. 363.

Consequences and effect of the judgment.—Whatever rights the plaintiff would have on a judgment recovered in a contested case, the same are assured to him on a judgment by default under this section.

As to effect generally of judgments in Division Courts and the subsequent proceedings that may be taken thereon, see notes to section 7, antep. 3, and also notes to sections 212 and 235.

For form of judgment, see Form 52.

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111.—(1) Where the defendant in an action within the Section meaning of section 109 of this Act, has left with the clerk motion for a notice to the effect in the said section provided, the plain-judgment. tiff in the action may, on an affidavit made by himself or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, serve the defendant with a notice of motion to shew cause before the Judge of the Division Court in which the action is brought, why the plaintiff should not be at liberty to have final judgment entered in his favour by the clerk for the amount of the debt or money demand sought to be recovered in the action, together with interest, if any, and costs. A copy of the affidavit shall accompany the notice of motion. The Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend the action, make an order empowering the clerk to sign final judgment accordingly.

(2) The application by the plaintiff for leave to have final judgment entered in his favour under the provisions of this section, shall be made on notice returnable not less than two clear days after service.

- (3) The defendant may shew cause against the application by offering to bring into court the amount sought to be recovered in the action, or by affidavit. In the affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part of the plaintiff's claim. And the Judge may, if he thinks fit, order the defendant to attend and be examined upon oath, or to produce any books or documents, or copies of, or extracts therefrom.
- (4) In case it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or

section that any part of his claim is admitted to be due, the plaintiff shall be entitled to have final judgment entered forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied, or any part thereof, into court by the bailiff, the taxation of costs, or otherwise, as the judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.

- (5) If it appears to the Judge that any defendant has a good defence, or ought to be permitted to defend, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to have final judgment entered against the latter, and may issue execution upon the judgment without prejudice to his right to proceed with his action against the former.
- (6) Leave to defend may be given unconditionally, or subject to such terms as to giving security or otherwise, as the Judge may think fit.
- (7) Nothing in this section contained shall apply to any action in which the amount of the debt or claim sought to be recovered does not exceed \$40. 48 V. c. 14, s. 4 (1-7).

Meaning of section 109.—This section is almost an exact copy of Rule 739 (formerly Rule 80) of the Judicature Act, changes being made only where they are rendered necessary by the difference in practice of the High Court of Justice and the Division Courts. Wherever a summons can properly issue under the 109th section of the Act, "for the recovery of any debt or money demand," then proceedings can be taken for speedy judgment under this section. But there are cases which would come under Rule 739, to which this section could not apply and vice versa. The provisions of the two statutes are substantially the same, however, and the cases decided under the Judicature Act will, with very few exceptions, apply to the section under consideration. As to what is a "debt or money demand" see notes to sections 70 and 109.

A garnishee proceeding would not be within this section: Cameron v. Allen, 10 P. R. 192. Nor would a case where proceedings were taken against the defendant as an absconding debtor, because other creditors have the right to intervene: Rule 36; Offay v. Offay, 26 U. C. R. 363.

It is submitted that where there is a bona fide notice disputing the jurisdiction of the court, the right to give judgment depends upon whether the court has jurisdiction. If it has no jurisdiction, cadet

quastio. If the jurisdiction is doubtful the Judge may exercise his disthe plaincretion whether or not to send the case to trial, so that viva voce evidence red forthmay be heard. There seems to be no necessity for a trial in court of such a question. A trial in court is for the purpose of disposing of actions does not within the jurisdiction and not primarily for the purpose of deciding ch terms, questions of jurisdiction. It is submitted, therefore, that on a motion under this section, the Judge may dispose of the question of jurisdiction, nt of any and if he decides he has none, may, on the application of either party transfer the case under section 87. the bailiff, nay think

After notice of defence.—Proceedings under this section can only be taken after the defendant has left with the clerk a notice disputing the plaintiffs claim as provided for in section 109.

In such action may.—The proceeding is optional with the plaintiff: R. v. S. E. Ry. Co., 4 H. L. Cas. 471; and his making the application or his not doing so, cannot affect his rights on the merits in any way See Gill v. Woodfin, 25 Ch. D. 707; Gibbings v. Strong, 26 Ch. D. 66. But it was held that if a plaintiff after appearance by the defendant, takes a deliberate step to have an action tried by a jury, he cannot move for judgment in this summary manner: Stewartstown Loan Co. v. Daly, 12 L. R. Ir. 418; Woodruff v. McLennan, 11 P. R. 22.

On affidavit.—The affidavit which the statute requires must be made: R. v. Judge of the Marylebone County Court, 50 L. T. N. S. 97.

Though the defendant might by distinctly waiving its production or the allegation of certain necessary facts, and agreeing to the plaintiff's statement of facts give the Judge power to make the order: see notes to section 87 as to consent; see also Ex parte Butters. Re Harrison, 43 L. T. N. S. 2; In re Guy v. G. T. Ry. Co., 10 P. R. 372; and the consent to adjudication could not be withdrawn: Harvey v. Croydon Union Rural Sanitary Authority, 26 Ch. D. 249.

As to formal parts of all affidavits, see notes to sections 86 and 110.

The affidavit can be made by plaintiff himself, "or by any other person" who can swear to the facts necessary to be shewn.

The affidavits should not only verify the cause of action but also pledge the deponent's belief that there is no answer to the plaintiff's demand: Kiely v. Massey, 6 L. R. Ir. 445.

A statement that I am "advised and believe defendant had no defence on the merits" to the action is sufficient: Manning v. Moriarty, 12 L. R. Ir. 372.

The right to obtain judgment in this summary way is an extraordinary one, and all facts necessary to be shewn and the observance of all requirements of the statute, are conditions precedent to the due making of the order: R. v. Judge of Marylebone C. C., 50 L. T. N. S. 97; Lloyd's Banking Co. v. Ogle, 1 Ex. D. 262; Runnacles v. Mesquita, 1 Q. B. D. 416.

A copy of the affidavit shall accompany the notice of motion.—See Begg v. Cooper, 40 L. T. N. S. 29. Although a notice of motion would be irregular without a copy of the affidavit accompanying it, yet, the writer thinks, on the views expressed by the Judges in the above case, it would only be a ground for enlarging the application until the plaintiff could let the defendant have a copy of the affidavit two clear days, pursuant to subsection 2. It also appears from the reasoning in that case, and applying the general principles of practice, that if the affidavit should be defective, the Judge could enlarge the application with a view of having the defect remedied upon such terms as would be just. See also Rule 118.

The debt or cause of action must be positively sworn to; there should not be any doubt appearing on the affidavit in that respect. The cause of action must be verified. What will satisfy the section in this respect must depend on the circumstances of each case.

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"The defendant is indebted to the plaintiff in the sum of \$ as perparticulars annexed to the summons herein," has been held to be sufficient: Murphy v. Nolan, 18 L. R. Ir. 468.

For form of affidavit, see Schedule of Forms,

Serve defendant with notice of motion.—The service of notice of motion on defendant personally would undoubtedly be sufficient: seenotes to section 99. But service, other than personal, can be effected. In Ward v. Vance, 9 U. C. L. J. 214, Adam Wilson, J., says in regard to service of an attaching order and summons to pay over under the garnishment clauses of the Common Law Procedure Act: "The statute does not require in express terms" (as here) "that there shall be personal service as our King's Bench Act of 1822 did of the Ca. Re., upon the defendant," and, "I am inclined to think that personal service is not imperatively demanded unless in those cases where it is sought,—that is, where it is the purpose and object, to charge the party with a contempt for not appearing to, or for not performing some act required by the writ, rule or order."

Sufficient service could be effected by serving defendant's wife at the dwelling house of defendant: Hanns v. Johnston, 3 O. R. 100; Trust & Loan Co. v. Jones, 8 P. R. 65; see, however, Hays v. Armstrong, 7 O. R. 621, or by leaving the notice of motion at the place of residence of the defendant with some grown up person there dwelling: In re A Solicitor, 14 Ch. D. 152; Carlisle v. Orde, 7 C. P. p. 459. See also Jones dem. Griffiths v. Marsh, 4 T. R. 464; Murray v. G. W. Ry. Co., 6 P. R. 211; R. v. North Riding of Yorkshire Jus., 7 Q. B. 154, to the same effect.

The case of Hogg v. Brooks, 14 Q. B. D. 475, was decided on the strict language of the case in question there, and does not impugn the authority of the cases previously cited here.

The following would not be sufficient: - Service on a clerk of defendant at the defendant's counting house: Rowland v. Vitzetelly, 6 M. & G. 723; Warwick v. Bacon, 7 M. & G. 961; nor by leaving the notice at the club house of the defendant: Davies v. Westmacott, 7 C. B. N. S. 829; nor by leaving it with defendant's warehouseman at defendant's warehouse, that being his place of business: Ibotson v. Phelps, 6 M. & W. 626: nor service on a workman on defendant's premises: Hitchcock v. Smith, 5 Dowl. 248; nor on a housekeeper at a place where several persons are residing without shewing that she had authority to receive papers for defendant: per Maule, J., Lewis v. Blurton, 7 C. B. 102; nor leaving it with the laundress at defendant's office: Dodd v. Drummond, 1 Dowl. 381; Kent v. Jones, 3 Dowl, 210; Alanson v. Walker, 3 Dowl. 258; Brown v. Wildbore, 1 M. & G. 276; much less with the servant or assistant of the laundress: Smith v. Spurr, 2 Dowl. 231; nor with the landlord or landlady of the house where the defendant lodges: Salisbury v. Sweetheart, 5 Dowl. 243; Biddulph v. Gray, 5 Dowl. 406; Gardner v. Green, 3 Dowl. 343; nor upon a female servant at defendant's lodgings: Price v. Thomas, 11 C. B. 543; nor by putting it under the door or into the letter-box of defendant's office: Strutton v. Hawkes, 3 Dowl. 25; Braham v. Sawyer, 1 D. & L. 466; Consumers' Gas Co. v. Kissock, 5 U. C. R. 542; Grand River Nav. Co. v. Wilkes, 8 U. C. R. 249; McCallum v. Pro. Ins. Co., 6 P. R. 101; nor by throwing it over the fenceto defendant's son who refused to have anything to do with it: McGuin v. Benjamin, 1 Cham. R. 142.

Where service is made on a domestic servant at defendant's residence, the affidavit of service should shew she is the defendant's servant: Alanson v. Walker, 3 Dowl. 258. And where it is made on some grown-upperson at defendant's residence it should be shewn that such grown-upperson at defendant's residence it should be shewn that

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person was in some way connected with defenda nt, as a member of his family, or otherwise, "that she was more than casually there:" per Draper, C.J., Carlisle v. Orde, 7 C. P. 459. If served on defendant's wife, the affidavit should shew it, and if on some other person the name should properly be given.

Service on Good Friday or other holiday would be good: Clarke v-Fuller, 2 U. C. R. 99; but not on Sunday: R. v. Leominster, 2 B. & S-301

It is very doubtful if service on one of several partners would be good service of a notice of motion for judgment against the firm. The consolidated rules of practice are not applicable: Clarke v. Macdonald. 4 O. R. 310; Bank of Ottawa v. McLaughlin, 8 A. R. 543; Pryor v. City Offices Co., 10 Q. B. D. 504; see notes to section 73. Section 108, it will be noticed, says that service "of the summons" on one partner shall be good service on the firm.

For the same reason an agent within section 101 cannot be served with notice of motion.

Judgment may be ordered under this section, against the separate estate of a married woman, where the affidavit shews such facts as would, upon a trial, entitle the plaintiff to such judgment: Durrant v. Ricketts, 8 Q. B. D. 177; Kinnear v. Blue, 10 P. R. 465; Quebec Bank v. Radford, 10 P. R. 619; Cameron v. Rutherford, 10 P. R. 620; Nelson v. Thomer, 11 A. R. 616; Canadian Bank of Commerce v. Woodcock, 13 P. R. 242; but if the debt were contracted prior to 1st July, 1884, it is necessary to prove that the married woman has the same separate estate at the time of action, as she had at that time: See Pike v. Fitzgibbon, 17 Ch. D. Turnbull v. Forman, 454; 15 Q. B. D. 234; Scott v. Wye, 11 P. R. 93, unless, perhaps, she was, at the time of contracting the debt, carrying on separate business; Berry v. Zeiss, 32 C. P. 231, and see Robertson v. Larocque, 18 O. R. 469. Cameron v. Heighs, 14 P. R. 56, contains a dictum that judgment against a married woman should not be given upon summary application, but in the result a judgment was ordered against separate estate, subject to a reference, and the dictum has not been followed: Nesbitt v. Armstrong, 12 C. L. T. 43. And it is now settled that a judgment against a married woman is personal and no proprietary: Pelton v. Harrison, (1892), 1 Q. B. 118.

As to debts of married women, see Index, title, Married Women.

An Indian is subject to summary proceedings under this section: Bryce v. Salt, 11 P. R. 112.

The notice could be given by a solicitor or agent for the plaintiff, and even if given without his authority, but in plaintiff's name, it might be ratified by him: Ancona v. Marks, 7 H. & N. 686; Blake v. Walsh, 29 U. C. R. 541, 545; Vanderlip v. Smyth, 32 C. P. 60.

The Division Court Rule respecting applications in Division Courts cannot apply to this case where specific statutory provision is made that the motion must be made by notice of motion. No other form of application than that which the statute prescribes would be proper.

Substitutional service of the notice of motion could not be ordered.

Where the affidavit is defective in form, and an application upon it fails in consequence, a second application can be made on fresh materials: Wagstaff v. Jacobowitz, W. N. (1884), 17; Sykes Brewery Co. v. Chadwick, 7 T. L. R. 258; Payne v. Newberry, 13 P. R. 392; but, semble, not where it is defective in substance, ib., see 13 M. & W. 560 (n).

By appearing and arguing the question on the merits, without objection, the defendant would thereby waive any defect in the notice or any objection to the sufficiency of the time of service, or even to any notice at

Section

Section all: Park Gate Iron Co. v. Coates, L. R. 5 C. P. 634; R. v. Stone, 1 East, 649; R. v. Shaw, 12 L. T. N. S. 470; R. v. Smith, L. R. 2 C. C. 110; Blake v. Beech, 1 Ex D. 320; R. v. Hughes, 4 Q. B. D. 614; Ward v. Raw, L. R. 15 Eq. 83; R. v. Crouch, 35 U. C. R. 433; R. v. Widdop, L. R. 1 C. C. 3; R. v. Heffernan, 13 O. R. 616; R. v. Hall, 12 P. R. 142; Stoueman v. Lake, 40 U. C. R. 320.

> The notice of motion and affidavit of services should, if possble, befiled with the Clerk before the return day: Re Rosier, Jones v. Bartholomew, 49 L. T. N. S. 442; Sear v. Webb, 49 L. T. N. S. 94, and forthwith transmitted to the Judge: Rule 86.

> By Rule 20, if a defendant gives notice of set-off or other statutory defence, or pays money into court, or pleads a tender, he shall be deemed to have sufficiently given the Clerk notice disputing the plaintiff's claim within the meaning of sec. 109.

For form of notice of motion, see Schedule of Forms.

On the merits.—See note to section 109, ante p. 148.

Make an order.—See notes to section 110.

For form of order, see Schedule of Forms,

Sub-section 2. Not less than two clear days.—This means two days at least, that is, excluding the day of service and the day when the motion is returnable before the Judge: see cases cited in notes to section 96 ante. But in Division Courts Sunday must be reckoned, the Consolidated Rules not being applicable, nor would service after two o'clock on Saturday afternoon be reckoned as of the following Monday: Clarke v. Macdonald, 4 O. R. 310; Bank of Ottawa v. McLaughlin, 8 A. R. 543; McLean v. Pinkerton, 7 A. R. 490.

Service on a corporation must be made on the corporation itself, through its proper officers. Casual knowledge acquired by one of its officers would not be good service: Société Generale de Paris v. Tramways Union Co., 14 Q. B. D. 424. See section 101.

Setting up defence. - The defendant may, by affidavit or otherwise, i.e., by other admissible evidence, satisfy the Judge that he has a good defence: United Founders v. Fitzgeorge, 7 T. L. R. 620. One of the methods employed in the higher courts is by cross-examining the deponents of the affidavits filed by the plaintiff. There is no discretion to refuse such cross-examination: Kingsley v. Dunn, 13 P. R. 300. There is no power in this court to grant a cross-examination, and the absence of that means of making out a defence should be considered by the Judge on hearing the application. For instance, judgment should not be ordered in an action on a note to which the defendant swears he would have a defence against the payee, and that he believes that the plaintiff is not a bona fide holder for value, and gives facts supporting, or reasons for entertaining such belief: Bank of Minnesota v. Page, 14 A. R. 347. It is a valuable and important part of the new procedure that the means should exist of coming by a short road to final judgment where there is no real defence to the action. But it is of at least equal importance that the parties should not be shut out from their defence when they ought to be admitted to defend: Per Lord Selborne, Wallingford v. Mutual Society, 5 App. Cas. 693.

The defendant must disclose a defence upon the merits. He should state what his defence is, and should give reasons for thinking the defence substantial: Runnacles v. Mesquita, 1 Q. B. D. 416; Dobie v. Lemon, 12 P. R. 64. If the defendant's affidavits show a good defence, the court has no discretion and cannot order payment into court: Ray v. Barker, 4 Ex. D. 279. If, however, facts are raised which although not satisfying the Judge that there is a good defence, the Judge may allow the defendant, either with or without terms, to raise such question, and fight it if

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s. He should ing the defence bie v. Lemon, ence, the court Ray v. Barker, not satisfying w the defendand fight it if he pleases. But the affidavits must condescend to give particulars. "You must give such an extent of definite facts as to satisfy the Judge that there are facts which make it reasonable that you should be allowed to raise the detence: Per Lord Blackburn, 5 App. Cas. 704: Davis v. Spence, 1 C. P. D. 721; Collins v. Hickok, 11 A. R. 620. If the defendant does not make out a clear defence on the merits, and the Judge, in the exercise of his discretion, orders payment into court or security, his order will not be interfered with: Nelson v. Thorner, 11 A. R. 616. If the defendant swears to credits which should be given, it is improper to order him to give security for the full amount and in default to shut him out altogether from the opportunity of reducing the claim: 5 App. Cas. 695. A surety is generally entitled to require the plaintiff to prove his claim: Lloyd's Banking Co. v. Ogle, I Ex. D. 262. Indorsers who deny notice of dishonour, may have the question tried: Ontario Bank v. Burke, 10 P. R. 561. An accommodation maker is entitled to have the question of whether the plaintiff gave value tried: Hughson v. Gordon, 10 P. R. 565; so, also, is the maker of a note alleging facts which constitute fraud or illegality: Fuller v. Alexander, 47 L. T. N. S. 443; Bank of Minnesota v. Page, 14 A. R. 347; Millard v. Baddeley, W. N. (1884), 96; Brooks v. Aylmer, 73 L. T. Jour. 80; or where he alleges an agreement to renew, and a tender of renewals pursuant thereto: Federal Bank v. Hope, 6 O. R. 209; Lowden v. Martin, 12 P. R. 496.

Where a defendant admitted part of the claim, but set up a counterclaim for a larger amount, judgment was refused: Court v. Sheen, 7 T. L. R. 556; and a fortiori, where the defence is a set-off: Groom v. Rathbone, 41 L. T. N. S. 591; Conmee v. C. P. Ry. Co., 11 P. R. 222, unless the counter-claim or set-off be too vague or misty to justify delaying the plaintiff: Bank of Ottawa v. Johnston, 9 C. L. T. 251.

In short, where a defendant shews a defence on the merits, or facts which upon development or cross-examination amount to a defence, or where an arguable point of law is raised, the power to order judgment should be used carefully and sparingly exercised, and never, unless it can be shewn that the plaintiff may be seriously prejudiced by waiting for the trial: Barber v. Russell, 9 P. R. 433. Where the facts are not clear and free from doubt, judgment should not be ordered: Stephenson v. Dallas, 13 P. R. 450; or, in other words, it must appear to a demonstration on the whole case that the defendant has no defence: Fell v. Williams, 3 C. L. T. 358; see, also Holmstead & Langton, 629.

The affidavit of the defendant need not be confined to facts within his knowledge. Where, however, his allegations are made upon information and belief, the Judge would be right in introducing the principles of practice of the High Court, under section 305, in requiring the source of information and grounds of belief, to be shewn: Harrison v. Bottenheim, 26 W. R. 362. Where there is, in the opinion of the Judge, something due, he may order judgment to be entered to stand as security until the correct amount be ascertained; but execution should not be issued or levied upon without leave: Wallingford v. Mutual Society, 5 App. Cas. 685; and where the action is upon a Solicitor's bill, the order will refer the bill to taxation and order judgment for the amount taxed: Smith v. Edwardes, 22 Q. B. D. 10. A money lender who had charged an usurious discount, was, on moving for immediate judgment, limited to five per cent: Parker v. Bland, 7 T. L. R. 462.

Affidavits in reply should not generally be allowed: Davis v. Spence, 1 C. P. D. 719; Girvan v. Grepe, 13 Ch. D. 174; and where the affidavits in reply are of all those who know of the dealings between the plaintiff and the defendant and negative the defendant's story, the defendant should be ordered to pay the money into Court: Dunnet v. Harris, 12 C. L. T. 194; 14 P. R. 437. It was held in Manitoba that anything which

could have been pleaded by a defendant under the old statutes of set-off, can now be brought forward in answer to an application for leave to sign judgment and will prevent an order being made allowing judgment to be signed: Manoque v. Mason, 3 Man. L. R. 603. An application to sign judgment against one defendant was refused in the absence of evidence as to the position of the action with reference to the others: Stewart v. Richard, 3 Man. L. R. 610.

Defendant may bring money into Court.—A defendant is not entitled to defend upon bringing the money into court, without an affidavit of merits: Crump v. Cavendish, 5 Ex. D. 211.

If the plaintiff succeeds in the action, he is entitled to the money paid into court: Bird v. Barstow, (1892), 1 Q. B. 94. If the defendant succeeds, he is entitled to have the money paid out to him, though notice of appeal may be given: Yorkshire Banking Co. v. Beatson, 4 C. P. D. 218.

Defence as to part.—Judgment for part of the claim not disputed will not be a bar to the recovery of the remainder.

Examined upon oath.—The order for defendant's examination may be granted either on a formal application, before hearing the motion, or to remove doubt from the mind of the Judge, after hearing the material which he had before him: Cockerell v. Van Diemen's Land Co., 16 C. B. 261. The order should not be made except during the pendency of the application for judgment and after service of the notice of motion: Traders Bank v. Kean, 13 P. R. 60. Counsel or agents for both parties should have an opportunity of being present and of taking part in such examination: Assessment Appeal, 6 L. J. N. S. 295; and if that opportunity was not accorded, then the depositions should not be received or acted upon: Stephenson v. Dallas, 13 P. R. 450.

It is submitted that the plaintiff is entitled to an order for the examination of defendant, and for production of documents: Morgan v. Thomas, 9 Q. B. D. 643; Metrop. Bd. of Works v. Steed, 8 Q. B. D. 445; Stroud, 537.

In case of disobedience by the defendant, he could be committed: See section 73; Martin v. Bannister, 4 Q. B. D. 491; Richards v. Cullerne, 7 Q. B. D. 623.

The statute makes no provision for the examination of a defendant corporation; or of any other person than the defendant. A person making an affidavit on behalf of the defendant could not be cross-examined.

Production of books or documents.—This provision as to production is quite independent of that contained in the 137th, Rule, which was evidently framed in the interests of defendants only. It is submitted that the object in ordering production is merely to satisfy the mind of the Judge whether the defendant has a probable defence or not. A minute examination or inspection should not be allowed the oppostie party, which in the opinion of the Judge might prejudice the defendant at the trial. The plaintiff should not be allowed a full discovery of the defendant's evidence in doubtful cases, when he cannot be compelled to make discovery himself.

Costs.—No provision is made for the payment of the travelling or other expenses of the defendant in attending to be examined. But it is submitted that the Judge may in the order impose pre-payment of conduct money as a condition of the defendant's attendance. See Form of Order.

It is submitted that a fair rule in regard to the costs of the application and examination, etc., would be that if such examination and production are followed by an order for immediate judgment, they should set-off, can ve to sign ment to be on to sign of evidence Stewart v.

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As the costs in any case must be trifling, probably they will usually be made costs in the cause, as unless the defendant is successful, he ought not to have resisted the application for judgment: Ward v. Proctor, 7 T. L. R. 244.

Leave to defend as to part. - Where a defendant admits part to be due, judgment may be ordered for that part. It cannot be made a condition of the defence for the remainder, that the part admitted be paid: Dennis v. Seymour, 4 Ex. D. 80.

The court may require that execution be not issued even for the part admitted; or that the amount remain in court till the whole dispute be decided, so that complete justice may be done. Care should be exercised that the defendant will, in no event, be compelled, after paying part, to resort, after the final hearing, to execution against the plaintiff.

Leave to defend conditionally .-- Where the only question was whether recognized agents of the defendants had exceeded their authority in issuing moneys for the defendant's business, leave to defend was granted conditionally on payment into court: Hong Kong and Shanghai Banking Co. v. Java Agency Co., 8 T. L. R. 58; see Dunnett v. Harris, 14 P. R. 437. An order giving the defendant leave to defend upon payment into court within a certain time, need not be served: Hopton v. Robertson, W. N. (1884), 77; Farden v. Richter, 23 Q. B. D. 124.

Claim must be over \$40.—The action must be one in which judgment by default could be signed under section 109. The summons and particulars must be sufficient, therefore, under that section. An amendment to the summons or particulars, after the service of the notice of motion for judgment, so as to comply with that section, will not give jurisdiction to order judgment: Gurney v. Small, (1891), 2 Q. B. 584.

112. The Judge, at any time before judgment actually Leave to dispute entered, although the time for giving the notice disputing claim at any time the plaintiff's claim has expired, may, on sufficient grounds before judgment. shown, and on such terms as he thinks just, grant leave to the defendant to dispute the plaintiff's claim, in which case the requisite notice disputing the claim shall immediately be left with the Clerk, and also sent to the plaintiff, by prepaid letter through the post or otherwise. R. S. O. ¹877, c. 47, s. 80.

Before judgment ac'ually entered .- If the clerk is in the act of entering up judgment, it is not actually entered: Harris v. Andrews, 3

Has expired .- See notes to section 109.

Grounds shewn .- The words "on sufficient grounds shewn" do not mean that the Judge has an arbitrary power in this respect of entertaining this application. He must do so. It is imperative; not simply discretionary on his part to hear it: MacDougall v. Paterson, 11 C. B. 755; notes to section 168.

On such terms.—See notes to section 109, sub-section 3.

Sections 112-114 Immediately left with the clerk.—"Within such time as is reasonably requisite," synonymous with "forthwith," as to which see section 20; Stroud, 365. It is the duty of the defendant to send the notice to the plaintiff, not that of the clerk.

Withdrawal of defence.

113. A defendant who has filed a notice of defence in any action may, by notice in writing to the clerk, at least six days before the sittings at which the same may be tried, withdraw such defence, and consent that judgment be entered against him for any amount, and the clerk shall immediately notify the plaintiff thereof by mail, and thereupon the plaintiff shall be entitled to have judgment entered by the clerk as by default for such amount, and the costs necessarily incurred. 49 V. c. 15, s. 20.

Notice in writing.—All notices required by this Act must be in writing: see section 93.

At least six days.—This means clear days. Notes to section 111, ante 158.

Immediately notify.—See notes p. 161, and to section 20, p. 16 ante.

As by default .- See section 109 and notes.

The power of the clerk to enter judgment by default under section 109 does not arise until the return day of the summons. Under this section it would appear to arise so soon as the defence is withdrawn, though the return day may not have arrived: see Turner v. Lucas, 1 O. R. 623; Heaman v. Seale, 29 Gr. 278.

For form of withdrawal under this section, see Forms.

Notices by Clerk.

Requisites of notices.

113a. In any case in which the defendant, primary debtor or garnishee has given the clerk notice that he disputes the plaintiffs claim, or any other notice of which the plaintiff should be informed before the trial, or in any case in which it has become the duty of the clerk to give notice to any party to a cause of any defence, admission, judge's order, or other matter, of which he should be notified before the trial, such notice shall show the place and time of the sittings of the court, at which the cause is to be heard. 52 V. c. 12, s. 25.

Trial.

Judge may summarily dispose of cause or non-suit plaintiff.

114. In cases in which a trial is to be had, the defendant shall, on the day named in the summons, either in person or by some person on his behalf, appear in the

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ne defendeither in ar in the court to answer, and, on answer being made, the Judge section shall, without further pleading or formal joinder of issue, proceed, in a summary way, to try the cause and give judgment; and in case satisfactory proof is not given to the Judge entitling either party to judgment, he may nonsuit the plaintiff; and the plaintiff may, before verdict in jury cases, and before judgment pronounced in other cases, insist on being nonsuited. R. S. O. 1877, c. 47, s. 81.

On the day named .- See section 8 as to appointment of times and places where and at which the courts are to be held.

As to manner in which the cases to be tried are to be set down for hearing, see sections 115 and 166 and notes.

"It is not usual to strike out a cause when the parties do not appear at the first call; that is if the court has not been sitting for half an hour, or longer, after the hour appointed for the court; they are commonly 'put aside for the present,' or placed at the 'foot of the list'; but the practice in different courts varies in this particular. It is always advisable that plaintiff should be present at the opening of the court, or immediately after, even though his case should stand low on the list, for all those previously entered may be put below his, or be otherwise disposed of. As to the defendant, it is essential that he should be present, for the case may be called on in his absence and judgment by default pass against him. Punctuality is necessary to dispatch; and if parties suffer from their own negligence, they have no right to complain. The plaintiff may appear by attorney or by agent, if he finds it inconvenient to appear personally. Any neighbour or member of the plaintiff's family may act as agent: but an appearance by some one must be made in the plaintiff's behalf." 2 U. C. L. J. 61

On his behalf.—At one time it was held that no one but a barrister or attorney could appear for another in Division Courts; but the statute now permits "any person" to appear: section 120.

Judge shall try the Cause.—It is the duty of the Judge to try the cause and give judgment. If satisfactory proof is not given entitling either party to judgment, he may nonsuit. If the plaintiff does not elect to be nonsuited, the Judge, if he has heard both sides, and is of opinion that the defendant has proved his defence, should give judgment for the defendant. When a case is being tried before a Judge without a jury, he should hear the whole case, and not give judgment until all the evidence has been heard. It is different when a case is being tried with a jury. There, if the Judge is of opinion that there is no evidence to submit to them, he may withdraw the case from their consideration. If the Judge is wrong, the case must go back to a jury for a new trial: Baker v. G. T. Ry. Co., 11 A. R. 68; Pryor v. City Offices Co., 10 Q. B. D. 504. "When a Judge tries a case without a jury, his position is very different. He has to decide the facts as well as the law:" Macdonald v. Worthington, 7 A. R. 564. If he is wrong, a Court of Appeal, in appealable cases, may reverse him upon the facts or upon the law; but they would have no right to reverse the verdict of a jury, when there was proper evidence to submit to them: Johnson v. Provincial Ins. Co., 27 C. P. 464; Dublin, Wicklow & Wexford Ry. Co. v. Slattery, 3 App. Cas. 1155; Metrop. Ry. Co. v. Wright, 11 App. Cas. 152; Webster v. Freideberg, 17 Q. B. D. 736; Commissioner of Railways v. Brown, 13 App. Cas. 133; unless the evidence so strongly preponderates in favour of one party as to lead to the

Sections conclusion that the jury in finding for the other party, have either 114-115 wilfully disregarded the evidence, or failed to understand and appreciate it: Connecticut Mutual L. Ins. Co. v. Moore, 6 App. Cas. 656.

Nonsuit the Plaintiff.—The Judge may nonsuit the plaintiff even against his will; and he also possesses the same power in jury cases: Rule 122. But he cannot nonsuit the plaintiff on counsel's opening speech to the jury. He is bound to hear the evidence: Fletcher v. London & N. W. Ry. Co., (1892), 1 Q. B. 122.

In an action of contract, a plaintiff may be nonsuited as to some or one of several defendants though judgment by default has been entered against the others: Benedict v. Boulton, 4 U.C. R. 96; McNab v. Wagstaff, 5 U. C. R. 588; and, if a joint contract, the nonsuit to those defending would enure to the benefit of those who did not defend: per Robinson, C.J., at page 97 of 4 U. C. R; see also Commercial Bank v. Hughes, 3 U. C. R. 361; s. c., 4 U. C. R. 167; Revett v. Brown, 5 Bing. 7; McNab v. Wagstaff, 5 U. C. R. 588. If a defendant moves for a nonsuit and afterwards examines witnesses, the plaintiff is entitled to any benefit which he can obtain from the defendant's evidence: Brock v. McLean, Tay. R. 398; Allen v. Cary, 7 E. & B. 463. A plaintiff may be nonsuited on an interpleader issue: Bryson v. Clandinan, 7 U. C. R. 198. There may be a nonsuit after payment of money into court: Gutteridge v. Smith, 2 H. Bl. 374; or after a plea of tender: Anderson v. Shaw, 3 Bing. 290; Oakes v. Morgan, 8 L. J. N. S. 248. A plaintiff may take a nonsuit at any time before the pronouncing of a verdict by a jury, but not after it is rendered and before it is recorded: Van Allen v. Wigle, 7 C. P. 459; Outhwaite v. Hudson, 7 Ex. 380.

Before judgment pronounced .- A judgment may be said to be "pronounced" when the Judge publicly and openly declares the decision of a case: Worcester, 1140.

Insist on being nonsuited .- With the object, if necessary, of suing again. It is submitted that if the Judge pronounces his decision on the case, giving judgment for the defendant, a plaintiff cannot insist on taking a nonsuit even if the judgment so pronounced is not noted by the Judge: Van Allen v Wigle, 7 C. P. 459.

Of course judgment of nonsuit entitles a defendant to his costs unless

otherwise ordered: see section 207.

A Judge has no power to go on and try a case in the absence of the plaintiff: Jordon v. Jones, 44 J. P. 800. It is submitted that the proper course would be to order a nonsuit.

The effect of a nonsuit is, that the parties are left in the same position,

except as to costs, as if the suit had never been commenced.

A nonsuit should not be granted on a motion for a new trial on a ground which if raised at the trial could have been cured by amendment: Clarke v. Barron, 6 A. R. 309.

Order in which | Mar actions to be tried.

115. The clerk shall place all actions in which the sum sought to be recovered exceeds \$100 at the foot of the trial list, and the other actions on the list and business of the court shall be disposed of before entering upon the trial of any of the first mentioned actions, unless the Judge shall, for special reason or reasons, otherwise order: the Judge shall, in such cases, when no agreement not to appeal has been signed and filed, take down the evidence in writing,

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and shall leave the same with the clerk of the court but in the event of an application for a new trial it shall be forwarded to the Judge by the clerk for the purposes of such application. 43 V. c. 8, s. 5.

At the foot of the trial list.—All suits for amounts exceeding \$100, whether commenced by attachment or not, must be placed at the foot of the list, unless the Judge otherwise orders. The section leaves all replevin suits, and those personal actions where the amount claimed does not exceed \$60, to be placed on the list the same as before.

For special reason or reasons.—The change should not be made unless the Judge, in the exercise of a judicial discretion, should determine, on the facts before him, that a reason or reasons existed for not disposing of the ordinary business of the court first. As to exercise of judicial discretion, see notes to sections 8 and 21. In every case the "reason" for deviating from the general rule must be determined according to its own particular circumstances.

Take down the evidence in writing.—It is also imperative on the Judge to take down the evidence in writing where there is no agreement not to appeal. It is suggested, in view of the fact that the Judge appeal may refuse to consider any question not raised before the Judge below: Williams v. Evans, L. R. 19 Eq. 547, and notes to section 148; that the Judge should take as full notes, not only of the evidence, but of all points of law arising at the trial, or of questions respecting the rejection or reception of evidence, or of the decision upon any motion for nonsuit, or otherwise, as fully as notes are usually taken of trials at nisi prius.

As to the agreement not to appeal, see notes to next succeeding section.

If the Judge omitted to take down the evidence in writing it would not invalidate the trial of the cause: Bank of Montreal v. Statten, 1 C. L. T. 66; Sullivan v. Francis, 18 A. R. 121.

It is doubtful if the duty to take down evidence applies to interpleader proceedings: 1b. But see section 155, sub-section 2, post.

It would be the province of the Appellate Court to dispense with the Judge's notes; Morgan v. Davies, 3 C. P. D. 260.

The judgment of the Division Court might be upheld on appeal on other grounds than those on which it proceeded: Chapman v. Knight, 5 C. P. D. 308. But costs would probably be refused: Page v. Austin, 7 A. R. 1; Garrett v. Roberts, 10 A. R. 650.

before the court opens, or if without the intervention of happeal if Parties may agree he before the court opens, or if without the intervention of happeal. The Judge before the commencement of the trial, there shall be filed with the clerk, in any case, an agreement in writing not to appeal, signed by both parties, or their solicitors or agents, and the Judge shall note in his minutes whether such agreement was so filed or not, and the minutes shall be conclusive evidence upon that point. 43 V. c. 8, s. 6.

Sections 115-116 Sections 116-117 No appeal.—The clauses regulating appeals under this Act will be found in sections 148-153 and the general law bearing on the same in the notes to those sections.

Court opens.—The court is considered open when the bailiff has made proclamation declaring the court open for the transaction of business.

Before the commencement of the trial.—The evident intention is to prevent the Judge in any way making any suggestion, or using persuasion against the right of appeal. He should be perfectly indifferent as to either course and leave the parties free to choose which they deem best. The "commencement of the trial" is a term of somewhat uncertain meaning. The trial would certainly have commenced if the jury had been sworn; or in a case tried by the Judge if any evidence was given whether oral or otherwise. See R. v. Gibson, 16 O. R. 704.

Agreement in writing.—The agreement must be "in writing" and duly signed and filed with the clerk. Should the parties, however, agree not to appeal and the signed agreement be omitted or overlooked, it is submitted that they would, if the Judge noted the consent, be bound by it: In re Burrowes, 18 C. P. 493; Cornish v. Abington, 4 H. & N. 549; R. v. Hughes, 4 Q. B. D. 614, and cases there cited; Wallace v. Fraser, 2 S. C. R. at p. 532; Thomas v. Brown, 1 Q. B. D. 714, and cases there cited; Young v. Taylor, 25 U. C. R. 593.

As to form of agreement, see Forms.

The agreement must be signed by the parties or their solicitor or agent. The agreement as given in the forms would not interfere with the right of either party to apply for a new trial, or to take any other proceeding which he would be entitled to take in an ordinary case.

The noting by the Judge of the signing of the agreement is made conclusive evidence of the filing of the agreement. No appeal could, therefore, be entertained when such a note had been made by the Judge.

Applies to interpleader.—This section applies to interpleader proceedings: see section 155, sub-section 2.

Proceedings in case defendant does not appear.

ant does not appear, or sufficiently excuse his absence, or if he neglects to answer, the Judge, on proof of due service of the summons and copy of the plaintiff's account, claim or demand, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the order, verdict or judgment thereupon shall be final and absolute, and as valid as if both parties had attended; and, except in tort or trespass, in case of the personal service of the summons and of detailed particulars of the plaintiff's claim, the Judge may, in his discretion, give judgment without further proof. R. S. O. 1877, c. 47, s. 82.

If he neglects to answer.—The defendant should make it a point to be at the court not later than the hour fixed for opening the sittings, for if proper service of the summons is effected, the Judge may proceed in his absence.

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Final and absolute.—The policy of the law is that there can be only one trial of a cause, and that a verdict or judgment should not be dis- 117-118 turbed unless it clearly appears to be wrong: Hooper v. Christoe, 14 C. P. 121, per Richards, C.J.; Arpin v. Reg., 14 S. C. R. 736; Hall v. Kennedy,

If there was no provision for granting new trials in Division Courts, no power would exist in such courts to do so: R. v. Doty, 13 U. C. R. 398; G. N. Ry. Co. v. Mossop, 17 C. B. 138, per Jervis, C.J.

The judgment is to be "final and absolute." Quære if a new trial can be granted. See section 146 and notes.

In case of the personal service. - Judgment can only be entered by default on "personal service" being made.

Should a summons for a claim less than \$15 not be personally served, a plaintiff would have to prove his claim to entitle him to judgment.

The plaintiff must also prove his claim in an action for "tort or trespass," and in all actions in which "detailed particulars of the plaintiffs' claim have not been served." It is said the Judge "may in his discretion" give judgment without further proof. The usual practice is to exercise

118. In case the Judge thinks it conducive to the ends Judge may of justice, he may adjourn the hearing of any cause in hearing of cause. order to permit either party to summon witnesses or to produce further proof, or to serve or give any notice necessary to enable the party to enter more fully into his case or defence, or for any other cause which the Judge thinks reasonable, upon such conditions as to the payment of costs and admission of evidence or other equitable terms, as to him seems meet. R. S. O. 1877, c. 47, s. 83.

May adjourn.—The Judge has a wide discretion under this section and Rules 140 and 141. It should only be exercised when a refusal to adjourn would work injustice, unless by consent of parties. If the power of adjournment had not been conferred by statute, it is doubtful if it could be exercised: R. v. Murray, 27 U. C. R. 134; R. v. G. W. Ry. Co., 32 U. C. R. 506.

It is submitted that less is required for postponing a trial in the Division Court than at Nisi Prius. The parties cannot, in all cases, anticipate, without pleadings or discovery, all the evidence that may be required, and the section gives the Judge full power to adjourn for further proof, or to enable the parties to serve such notices to admit or produce, or other notices, as will cause all the facts to be fully brought out. The object is that complete justice may be done: Rule 140. No order is necessary to be served, unless by direction of the Judge: Rule 139.

A trial will not be postponed at Nisi Prius until after the trial of an indictment for perjury, in a matter relating to the cause: Johnson v. Wardle, 3 Dowl 550. A trial was put off because a material witness was prevented from attending by fraud of the opposite party: Turquand v. Dawson, 1 C. M. & R. 709.

It is the practice to accede to an application to postpone the trial of a cause on the ground of the absence of a material witness when the application appears reasonable: Stevens v. Esling, 2 F. & F. 136.

Inability of the defendant to attend owing to the state of his health, entitles him to an adjournment: Schultz v. Wood, 6 S. C. R. 585. If a person allows a witness to leave the country, knowing that his evidence is material, he cannot have the trial postponed on that account: Solomen v. Howard, 12 C. B. 463. A Judge has a discretion in refusing the postponement of a case, notwithstanding the absence of a witness: Turner v. Meryweather, 7 C. B. 251. A trial will not be postponed where a witness is in defendant's employ and he has neglected to subpoena him in time and allowed him to leave: Wright v. M'Guffie, 4 C. B N. S Unless an endeavour has been made to procure the attendance of a vitness, a postponement will be refused: Ward v. Wilkinson, 2 F. 2 F. 173: or if it appears that no application has been made to the witness to know if he will attend: Worsley v. Bisset, 3 Dougl. 58 If a witness is kept out of the way by plaintiff a trial will be postponed on application of defendant: Duberly v. Gunning, Peake, 97. If witness is out of the country, and it does not appear that there is a likelihood of his returning, the postponement will be refused: R. v. D'Eon, 1 W. Bl. 515. Sometimes the application will be refused if the party applying has conducted himself unfairly, or has been the cause of any improper delay: Saunders v. Pitman, 1 B. & P. 33. The illness of defendant's attorney was held a good cause for postponing a trial: Hayley v. Grant, Sayer, 63; but not where counsel was unprepared: Colebrooke v. Dobbs, 3 Burr. 1319. A party should apply at once (see Rule 140) otherwise he would have to pay the costs of the opposite party in preparing for trial: see Dale v. Heald, 1 C. & K. 314; Ward v. Ducker, 5 M. & G. 377. The party obtaining an adjournment on payment of costs should take the means at once to have costs taxed: Waller v. Joy, 16 M. & W. 60; Brega v. Hodgson, 4 P. R. 47; but he may abandon the order without being liable for other than costs of the application: Allen v. Mathers, 9 P. R. 477. When application is made on the ground of the absence of a witness, it is not enough to show that the witness is material, and may and probably will give important evidence, or to swear that his evidence will be material and necessary, without showing that it will assist the case of the person making the application: Kerr v. G. T. R. Co., 4 P. R. 303. In Speers v. G. W. R. Co., 6 P. R. 170, it was held, in an action for personal injury, that the inability properly to calculate the damages to the plaintiff, owing to sufficient time not having elapsed from the receipt of the injury was a sufficient ground for postponing the trial. The Judge may, under this section, adjourn the hearing of a cause from the regular sitting of the court to his chambers, within the territorial limits of the division; and such adjournment of the hearing of the cause is in effect, if not objected to by the parties, an adjournment of the court to hear that cause: In re Burrows, 18 C. P. 493: see also notes to section 79, and an article at page 35 of 3 L. C. G., on the adjournment of causes for the purpose of putting in statutory defences by leave of the Judge.

See also Stuart v. Gladstone, 7 Ch. D. 394; Parnell v. Walter, 5 T. L. R. 577.

Costs.—When the adjournment is applied for to suit parties, the party applying must pay all costs that have been incurred by the case being on the list: Lydall v. Martinson, 5 Ch. D. 780. When a party has made diligent attempts to obtain a witness, costs should be in the cause: Knox v. Porter, 11 P. R. 250. Security may be ordered for the whole or part of claim: Bank of Hamilton v. Stark, 13 P. R. 213; but application must be promptly made: McMillan v. McDonald, 22 Gr. 362. Where a trial is postponed without costs, and a settlement is afterwards arrived at, it is beyond the power of the Judge to amend his order by ordering payment of costs: Noonan v. Bank of B. N. A. 10 C. L. T. 93.

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Other equitable terms.—It is not unusual to require the party applying to admit some matters of formal proof: Brown v. Murray, 4 D. & R. 830. Whatever terms the Judge thinks just can be imposed. His discretion in this respect should be reasonably exercised, and not capriciously: see notes to section 20.

Sections 118-119

Order.—The order need not be served except by direction of the Judge: Rule 139.

Judge, if he thinks it expedient for the interest of justice, trial may postpone or adjourn the trial for such time and upon such terms, if any, as he shall think fit. 48 V. c. 14, s. 10.

Adjourn the trial.—It was evidently intended to remove any doubt as to the power of the Judge, in cases where a jury is summoned, to adjourn the trial, and to impose on a party applying for adjournment the payment of the fees of jurymen who may be required to return on another day: See R. v. Hart, 45 U. C. R. 1.

A Judge may "consider it expedient for the interests of justice" that the trial of a cause should be postponed; yet not be willing to consider it just to impose on the taxpayers of a county the payment of jury fees in such a case: see section 170, and by this section, it is submitted, he is em_owered to impose the payment of such fees, as well as other costs, on the party making the application.

A party in whose favour the postponement is granted, having acted upon it, or taken advantage of its provisions, is bound by its terms and cannot repudiate any part of it: Griffin v. Dickenson, 7 Dowl. 860; Giraud v. Austen, 1 Dowl. N. S. 703; King v. Simmonds, 7 Q. B. 289; McKenzie v. Stewart, 10 U. C. R. 634.

So that if a party obtained a postponement on payment of costs, he would, unless he abandoned the order, be bound to pay them for he could not take the benefit of the order without its burthen: Richardson v. Shaw, 6 P. R. 296; see also Martin v. McCharles, 25 U. C. R. 279.

The words "upon payment of costs" are words of agreement, not mere words of condition, and execution may be issued upon an order in these words: Stuart v. Branton, 9 P. R. 566.

A Judge could open again an order for adjournment granted by himself, or even rescind it before it was acted on, upon his discovering that he had made it inadvertently, or had been surprised into making it by any perversion or concealment of facts, or from the misconception on his part of the law or facts: Shaw v. Nickerson; Gillespie v. Nickerson, 7 U. C. R. 541; Hughes v. Field, 9 P. R. 127. But after an order has been made and acted upon the Judge cannot make an order varying it; Noonan v. Bank of B. N. A. 10 C. L. T. 93.

So long as an order stands unreversed it will be assumed that neither party is dissatisfied with it: Hall v. Brown, 3 P. R. 293.

Should there be any objection to the mode of complying with the order application should be made to the Judge who made it for correction: Ross v. Grange, 4 P. R. 180.

If the order do not prescribe when the fees and costs are to be paid the party would have fifteen days from the rendering of the decision in which to pay: Rule 149.

Where consent is given to the making of an order, such consent cannot be arbitrarily withdrawn: Harvey v. Croyden Union Rural Sanitary Authority: 26 Ch. D. 249.

See also notes to section 118.

Sections 120-121

All persons empowered to act as agents or advocates.

120. Any person may appear at the trial or hearing of any cause, matter or proceeding as agent and advocate for any party to any such cause, matter or proceeding in the Division Courts. R. S. O. 1877, c. 47, s. 84.

Any person.—The words "any person" are wide enough to include the case of a woman appearing on behalf of another: R. S. O. p. 4; Duck v. Bates, 12 Q. B. D. 79; Stroud, 39; see Beresford-Hope v. Sandhurst, 23 Q. B. D. 79. A mandamus will lie to compel a Judge to hear an agent, unless he be a person whom the Judge has rightly excluded under section 121; R. v. Assessment Com. of St. Mary Abbotts, Kennington, (1891), 1 Q. B. 378. But a Judge may exclude such person under section 121. On this subject see Cobbett v. Hudson, 15 Q. B. 988; notes to section 114; see also Lord v. Hall, 8 C. B. 627; Lindus v. Bradwell, 5 C. B. 583; Cotes v. Davis, 1 Camp. 485.

A party may appear in his own behalf and be a witness in the cause too: Cobbett v. Hudson, 1 E. & B. 11; but a plaintiff or defendant will not be heard in his own case after counsel has addressed the court: Newton v. Chaplin, 10 C. B. 356: and a barrister is in no better position than any one else: Ib.

Where defendants at a trial appear by different counsel, it is a matter for the discretion of the Judge, to be exercised under all the circumstances of the case, whether more than one ought to be allowed to address the jury: Nicholson v. Brooke, 2 Ex. 213; or to cross-examine a witness: Walker v. McMillan, 6 S. C. R. 241.

An advocate can act as such in a cause, and as a witness as well: Davis v. Canada F. M. Ins. Co., 29 U. C. R. 452, but see remarks as to the impropriety of such a course: 1b.

An agent or attorney retained for the conduct of an action has not implied authority, after judgment in favour of the client, to enter into an agreement on his behalf to postpone execution: Lovegrove v. White, L. R. 6 C. P. 440; see Butler v. Knight, L. R. 2 Ex. 112.

A counsel or solicitor, generally speaking, have authority to bind a client: Strauss v. Francis, L. R. 1 Q. B. 379; Wilson v. Corp. Huron and Bruce, 11 C. P. 548; Brown v. Blackwell, 26 C. P. 43; Moody v. Tyrrell, 6 P. R. 314; Matthews v. Munster, 20 Q. B. D. 141; Vardon v. Vardon, 6 O. R. 736; McDonald v. Field, 12 P. R. 213; see, however, Watt v. Clark, 12 P. R. 359; Stokes v. Latham, 4 T. L. R. 305.

Judge may prevent any one from acting as agent or advocate in certain cases.

121. The Judge or acting Judge may, wherever in his opinion justice appears to require it, prevent any person from appearing at the trial or hearing of any cause, matter or proceeding in the court, as agent and advocate for any party or parties to any such cause, matter or proceeding. R. S. O. 1877, c. 47, s. 85.

It is submitted that under this section a Judge could even refuse to allow a barrister or solicitor appearing in a Division Court case as "agent and advocate."

The power is not given to prohibit generally, but a particular person, at the trial or hearing of any cause, mutter or proceeding.

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If a barrister or solicitor should misconduct himself, either towards sections the Judge, or a witness, or otherwise, it is submitted that the Judge would not only have the power, but it would be his duty, to prevent such person from further appearing in the case; and this too in addition to any fine he might find it necessary to impose for contempt of court under section 275. Sec also section 52.

Tender or Payment of Money into Court,

122. If the defendant in an action of debt or contract Plea of tender and brought against him in a Division Court, desires to plead a payment of money into tender before action brought, of a sum of money in full Court. satisfaction of the plaintiff's claim, he may do so on filing his plea with the clerk of the court before which he is summoned to appear, at least six days before the day appointed for the trial of the cause, and at the same time paying into court the amount of the money mentioned in the plea; and notice of the plea and payment shall be forthwith communicated by the clerk of the court to the plaintiff by post (on receiving the necessary postage), or by sending the same to his usual place of abode or business. R. S. O. 1877, c. 47, s. 86.

Debt or contract.—This provision, it will be observed, does not apply to any action of tort, but to actions in "debt or contract" only. The plea is only applicable where the party pleading has been guilty of no breach of contract: Hume v. Peploe, 8 East, 168, 170. Therefore, where a debt is payable on a day certain, as on an acceptance, the plea is inapplicable: Poole v. Tunbridge, 2 M. & W. 223. It cannot be pleaded to an action for unliquidated damages: Davys v. Richardson, 20 Q. B. D. 722; S. C. 21 Q. B. D. 202.

Tender.-" The principle of a plea of tender is this, that the defendant has always been ready at all times to pay upon request, and on a particular occasion offered the money:" Hesketh v. Fawcett, 11 M. & W. 356. "It is a performance of the contract on the part of the defendant so far as he could perform it, and was not prevented by the plaintiff:" Bullen & Leake, 3rd Ed. 693. A plea of tender (like a plea of payment into court) operates as an admission of the special contract stated in the claim to which it is pleaded: Cox v. Brain, 3 Taunt. 95: Huson Cotton Co. v. Canada Shipping Co., 13 S. C. R. 401. It supersedes the necessity of shewing that a guarantee was in writing: Middleton v. Brewer, Peake, 15.

Where a note is payable on demand, a tender of the amount and interest any time before action is good: Norton v. Ellam, 2 M. & W. 461.

By whom tender must be made.—The tender need not be made by the debtor himself, it is sufficient if made by his agent or servant, and a tender made by an agent, at his own risk, of more money than is given to him is good: Read v. Goldring, 2 M. & S. 86.

To whom a tender must be made.—A tender to a person authorized to receive payment is sufficient: Goodland v. Blewith, 1 Camp. 477; Kirton v. Breithwaite, 1 M. & W. 310. So is a tender to a managing

clerk, though he should have received orders not to accept it: Moffat v. Parsons, 5 Taunt. 307. So if he refuse, saying he had no instructions: Finch v. Boning, 4 C. P. D. 143, per Coleridge, C.J.

Where a solicitor sends a letter to demand, and the debtor makes a tender to hhn, it is a good tender, unless the solicitor disclaims his authority at the time: and if the solicitor is absent, a tender to a clerk at his office is sufficient: Wilmot v. Smith, 3 C. & P. 453; Kirton v. Braithwaite, 1 M. & W. 310. But without any previous demand a tender to the managing clerk of the plaintiff's solicitor, who disclaims authority to receive it, is not sufficient: Bingham v. Allport, 1 N. & M. 398; Watson v. Hetherington, 1 C. & K. 36. A tender to the solicitor of the plaintiff, so long as he remains such, is good: Crozer v. Pilling, 4 B. & C. 26; Moody v. Tyrrell, 6 P. R. 314. So also a tender if made to a person in the office of plaintiff's solicitor to whom defendant was referred by a clerk in the office, and who refused the tender only as being too little, without shewing who that person was: Wilmot v. Smith, supra. tender to a person in a merchant's place of business, who appeared to be conducting it, is good, though in fact not intrusted to receive money: Barrett v. Deere, M. & M. 200. It is otherwise where payment is not connected with plaintiff's business, but quite collateral to it: Sanderson v. Bell, 2 C. & M. 304. Where money was brought to plaintiff's house, and delivered to his servant, who appeared to go with it to his master, and returned saying his master would not take it, it was held to be evidence from which a tender might be inferred: Anon, 1 Esp. 349. A tender of a partnership debt to one of several partners is good: Douglas v. Patrick, 3 T. 11, 683. If a man is indebted to several persons in different sums, and when they are all together, tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender: Black v. Smith, Peake, 88. But where a party has separate demands for unequal sums against several persons, an offer of one sum, for the debts of all, will not support the defence that a certain portion of this sum was tendered for the debt of one: Strong v. Harvey, 3 Bing. 304. A tender to an executor may be good, though he has not proved the will, provided he afterwards proves the will and takes upon himself the burthen of administration: Add. on Con., 154.

A debtor cannot apply a set-off in reduction of the amount due so as to make a tender of the balance good: Searles v. Sadgrave, 5 \pm . & B. 639.

Mode of Making.—A tender to be strictly legal, should be made in legal coin: Polglass v. Oliver, 2 C. & J. 15.

Up to \$10 it may be made in silver; and to 25c, in copper; R. S. C. c. 30, s. 5.

Bank notes are a good tender if not objected to: Wright v. Reid, 3 T. R. 554; Tiley v. Courtier, 2 C. & J. 16, note (c.)

A tender made in the form of a cheque in a letter is good when no objection is made to the quality, but the quantity of the tender, and if the letter contain a request for a receipt to be sent back, it does not vitiate the tender, it not being a condition: Saunders v. Graham, Gow. 111.

An offer of money by a debtor to a creditor, and a request by the latter for a day's delay before receiving it, on account of an accident, are not a tender and refusal of the money, and do not discharge the debtor: Jenkyns v. Brown, 14 Q. B. 503.

Production of the Money.—There must be production of the money, or that dispensed with by the express declaration or equivalent act of the creditor: Thomas v. Evans, 10 East, 101; Polglass v. Oliver, 2 C. & J. 17; Dickinson v. Shee, 4 Esp. 68; Matheson v. Kelly, 24 C. P. 598. A tender is not good where the money is not in sight, but the witness supposed it

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was in a desk and did not see it produced; so that it did not appear that if the party was willing to accept the money, it could at once be paid; the money should be at hand and capable of immediate delivery: Glasscott v. Day, 5 Esp. 48. But where more is claimed to be due, it is not necessary to produce the money tendered: Black v. Smith, Peake, 88. Where the facts were found to be that the defendant's attorney called on the plaintiff, and said, "I come to pay you £1 12s. 5d., which the defendant owes you," that the attorney put his hand in his pocket, but did not produce the money, the plaintiff said, "I cannot take it, the matter is now in the hands of my attorney," held, not a sufficient tender: Finch v. Brook, 1 Bing. N. C. 253. A tender made with the money twisted up in bank notes in the person's hand, he stating how much, and not shewn to the party, is good: Alexander v. Brown, I'C. & P. 288. If the plaintiff says he can't take the money, when an offer is made to go up-stairs and fetch it, such offer is a good tender: Harding v. Davies, 2 C. & P. 77, but if it did not appear that the person tendering had the money upstairs, it might not be; Kraus v. Arnold, 7 Moore, 59. In this case, where the defendant ordered A. to pay the plaintiff £7 12s. 0d., and the clerk of the plaintiff's attorney demanded £8, on which A. said he was only ordered to pay £7 12s, 0d. which sum was in the hands of B,, and B. put his hand to his pocket with a view of pulling out his pocket-book to pay £7 12s 0d. but did not do so, by the desire of A., but B. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time; held, that this was not a legal tender, as the money should have been produced to the attorney's clerk: but see Long v. Long, 17 Gr. 251. Where a vendor admits a tender would be fruitless, it is unnecessary: Jackson v. Jacob, 3 Bing. N C. 869. If a party tells his creditor that he will pay him so much, and puts his hand in his pocket to take out the money, but before he can get it out the creditor leaves the room, and the money is not produced till he is gone, it is no tender: Leatherdale v. Sweepstone, 3 C. & P. 342; Matheson v. Kelly, 24 C. P. 598; see Howell v. Listowel Rink Co., 13 O. R. 476. Where the plaintiff disputes the quantum to prove a tender, some money must be proved to have been produced, though it is not necessary to prove the exact sum: Dickinson v. Shee, 4, Esp. 68. A trader who, under a trader debtor summons, had signed an admission of debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come to pay that amount, the creditor said it was of no use, as it was too late, and that the debtor must see the creditor's solicitor; it was held that the production of the money was dispensed with, and that the tender was good: Danks, Exparte, 2 DeG. M. & G. 936; s. c. 22 L. J. N. S. Bank. 73; see also Reynolds v. Allan, 10 U. C. R. 350; Western Ass'ce Co. v. McLean, 29 U. C. R. 57. Where, on tendering payment of money due upon a mortgage, a receipt was required, and the plaintiff did not object on that ground, but gave a different reason for refusing the money, held a good tender: Lockridge v. Lacey, 30 U. C. R. 494; see also Llado v. Morgan, 23 C. P. 517.

Requiring change.—A plea of tender of £ 0 is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive and not as the sum out of which he was to take the £20: Dean v. James, 4 B. & Ad. 547; but a tender of a larger sum, requiring change, is not a good tender of a smaller sum: Robinson v. Cook, 6 Taunt. 336; Betterbee v. Davis, 3 Camp. 70. A tender of £2, to pay £1 13s. 0d., is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change: Cadman v. Lubbock, 5 D. & R. 289. A tender of part of the claim, and a counter-claim for more than the full amount of the debt, is not a good tender: Brady v. Jones, 2

D. & R. 305, and see Holland v. Phillips, 6 Esp. 46. The defendant owed £108, demanded by the attorney for his creditor; he sent a man, who laid down on the desk one hundred and fifty sovereigns, out of which he desired the attorney to take the principal and interest, but the attorney refused to do so, unless a shop account due from plaintiff to defendant was fixed at a certain amount. Held, a good tender of the £108: Bevans v. Rees, 5 M. & W. 306; see also Gretton v. Mees, 7 Ch. D. 833.

Demand of a receipt.—Going with money in hand to make a tender, and demanding whether the creditor has a receipt stamp, and receiving an answer in the negative, but not offering the money, was held not a tender: Ryder v. Townsend, 7 D. & R. 119. A tender is not good if accompanied by a demand for a receipt in full of all demands: Griffith v. Hodges, 1 C. & P. 419; or where a receipt was demanded that the sum tendered was the balance due: Higham v. Baddely, Gow. 213. But if the creditor refuse to receive the money on account of more being due, he cannot afterwards object that a receipt was demanded; Richardson v. Jackson, 8 M. & W. 298. Where the words of a tender were, "I offer you £7 16st. 8d. as the balance of £35, and request a receipt in full," it was held invalid as being conditional: Foord v. Noll, 2 Dowl. N. S. 617. A tender of a quarter's rent, coupled with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent was due, is not a valid tender: Finch v. Miller, 5 C. B. 428; but the demand of a receipt simply for the amount of money tendered does not invalidate the tender: Lockridge v. Lacey 30 U. C. R. 494.

In Black v. Allan, 17 C. P. 248, Richards, C.J., said: "As to tender, the later cases seem to lay it down where there is anything equivocal in the conduct of the party to whom the tender is made, it is a question of fact for the jury to decide whether the tender be absolute or conditional, and whether the party dispenses with the production of the money or not." See, also, Tobey v. Wilson, 43 U. C. R. 230.

Under protest.—A tender of the full amount demanded under protest is good: Manning v. Lunn, 2 C. & K. 13; Scott v. Uxbridge & Rickmansworth Ry. Co., L. R. 1 C. P. 596; Sweny v. Smith, L. R. 7 Eq. 324; Thorpe v. Burgess, 8 Dowl. 602; Greenwood v. Sutcliffe (1892), 1 Ch. 1.

Demand prior or subsequent to tender.—The substance of the defence being that, that defendant was "always ready and willing" to pay the debt, the defence will be defeated by showing a demand and refusal prior or subsequent to the tender: Bennett v. Parker, Ir. R. 2 C. L. 89; Poole v. Tumbridge, 2 M. & W. 223, 226. 1 Wms. Saund. 33 c. (2). The onus of proving the subsequent demand is on the creditor, and if for more than the precise sum tendered it will be bad: Spybey v. Hide, 1 Camp. 181; Rivers v. Griffiths, 5 B. & Ald. 630. And it must be by some one authorized to receive it and grant a discharge: Coore v. Callaway, 1 Esp. 115; even in replevin: Pimm v. Grevill, 6 Esp. 95. A subsequent demand on one of two joint debtors is sufficient: Peirse v. Bowles, 1 Stark, 323. A letter sent by the plaintiff and received by the defendant, demanding the sum tendered is not sufficient evidence of subsequent demand; for at the time of the demand the defendant should have an opportunity of immediately paying the sum demanded: Edwards v. Yeates, Ry. & M. 360. But it was held in Hayward v. Hague, 4 Esp. 93, that a letter demanding a debt sent to defendant's house, to which answer was made that it would be settled, was held sufficient evidence of a demand on the issue of subsequent demand and refusal to a plea of tender. The subsequent adoption of a demand is not sufficient: Story on Agency, para. 247.

A proper tender v⁻¹l stop the running of interest if the mortgagor keeps the money ready to pay off the mortgagee: Gyles v. Hall, 2 P. Wms. 377.

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The refusal of a tender is not such a breach of contract as will sup- Sections port an action; Bank of New South Wales v. O'Connor, 14 App. Cas. 122-123 273, 284.

A plaintiff can be nonsuited after plea of tender if he does not appear, and in such a case it is the proper course: Anderson v. Shaw, 3 Bing. 290.

Notice.—Notice of the plea and payment must be at once communicated by the clerk to the plaintiff: see Form 102, section 10; Rule 87; nee also Rule 125.

123. The said money shall be paid to the plaintiff, Amount to be paid to less \$1 to be paid over to the defendant for his trouble, in plaintiff, etc. case the plaintiff does not further prosecute his action; and all proceedings in the action shall be stayed unless the plaintiff, within three days after the receipt of notice of the payment, signifies in writing to the clerk of the court his intention to proceed for his demand, notwithstanding such plea; and in such case the action shall proceed accordingly. R. S. O. 1877, c. 47, s. 87.

Shall be stayed .- The defendant is permitted to file his plea and pay the amount into court, and the plaintiff has three days, exclusive of the day on which he receives the notice (see notes to section 109) to determine whether he will accept or not. If a plaintiff can determine what he will do after the prescribed time then there is no limit to it and the provisions of the statute would be useless. If nothing is done the court has no jurisdiction to proceed with the action: Re McGregor v. Norton, 13 P. R. 223.

Notwithstanding Rule 125 (which if it has application to this case, only applies to the duty of the clerk), it is submitted, that the time does not commence to run against the plaintiff until the actual receipt of the notice: McCrea v. Waterloo M. F. Ins. Co., 26 C. P. p. 438, per Galt, J.; In Appeal, 1 A. R. 231; McCann v. Waterloo M. F. Ins. Co., 34 J. C. R. 376. If he rejects the payment, the case is to be tried at the next sitting of the court after the receipt by the cierk of the notice of such rejection : Rule 129.

The delay not being by the act of the court or its officers it is submitted that the notice could not be given, nor allowed to be given, nunc pro tunc: Lanman v. Audley, 2 M. & W. 535; Freeman v. Tranah, 12 C. B. 406; Moor v. Roberts, 3 C. B. N. S. 845, per Williams, J. Where a stay of proceedings was " until the further order of the court," it was held that neither party could abandon the order, because each party had an interest in it: Wilson v. Upfill, 5 C. B. 245. Wilde, C.J., says, at page 246: "It continues to be a binding order until rescinded by the authority by which it was made." Here the state stays proceedings, "unless" the plaintiff signifies his intention of proceeding with the action, and in that case only.

See also Greaves v. Fleming, 4 Q. B. D. 226; Wheeler v. Gibbs, 3 S. C. R. 374.

A plaintiff cannot get money paid into court out, until the suit in which it is paid in is determined, unless the Judge otherwise orders. This is governed by Rule 130 of the Division Court Rules. v. School Board of Ystradyfodwg, 24 Q. B. D. 307.

See notes to sections 125, 126, as to payment into court and the proceedings thereon.

Fretions 124-125

Rule as to costs in such cases,

124. If the decision thereon be for the defendant, the plaintiff shall pay the defendant his costs, charges and expenses, to be awarded by the court, and the amount thereof may be paid over to him out of the money so paid in with the said plea, or may be recovered from the plaintiff in the same manner as any other money payable under a judgment of the court; but, if the decision be in favour of the plaintiff, the full amount of the money paid into court as aforesaid shall be applied to the satisfaction of his claim, and a judgment may be pronounced against the defendant for the balance due and the costs of suit according to the usual practice of the court in other cases. R. S. O. 1877, c. 47, s. 88.

Costs, charges and expenses.—" This would also include the defendant's expenses of attending on his own behalf, if he did so attend expressly for the purpose of giving evidence on his own behalf, and not to superintend the cause:" Howes v. Barber, 18 Q. B. 588; or such sum as the Judge might think proper to order a defendant, though not a witness. under section 207. See also Fox v. Toronto & Nipissing Rv. Co., 7 P. R. 157; and notes to section 207.

If the decision of the question on a plea of tender be for the defendant there is no discretion as to costs, the statute arbitrarily determines how they shall be awarded by the court. But if the decision be in favour of the plaintiff, the amount of the money paid into court shall be applied to the satisfaction of his claim, and the Judge may pronounce judgment against the defendant for the balance due and the costs of the suit according to the usual practice.

See sections 125, 126, and notes.

Defendant may pay

125. The defendant may at any time, not less than six money into days before the day appointed for the trial, pay into court such sum as he thinks a full satisfaction for the plaintiff's demand, together with the plaintiff's costs up to the time of such payment. R. S. O. 1877, c. 47, s. 89.

> Not less than six days .- This means clear days. See notes to section 96. If he do not pay into court at least six days before "the days appointed for trial," he cannot make the payment afterward, though the trial may be adjourned: Fletcher v. Baker, L. R. 9 Q. B. 372.

> The word "defendant" in this section must, in case of an action against two or more, be read defendants: Interpretation Act, s. 8, s-s. 23.

The English County Court Rules require a defendant to pay money into court, if he desires to do so, at least five clear days before the "return day," and where a summons was issued on the 14th March returnable on 15th April, and on 8th April defendants paid money into court; it was held the payment into court was not too late: Stevens v. Hounslow Burial Board, 61 L. T. N. S. 889.

Care must be taken to pay into court enough to satisfy the full claim to damages and costs to the time of paying the money in. Interest, if allowable, must be calculated to the time of payment, and not merely to the issue of the summons: Kidd v. Walker, 2 B. & Ad. 705.

Where several matters are included in one suit, payment into court may be made to all: Marshall v. Whiteside, 1 M. & W. 188.

When pleaded to a cause of action which, in a higher court, before the Judicature Act, would have come under the head of indebitatus counts, it admits "that the defendant is liable in respect of some one or more contracts or causes of action stated in the general counts, to the extent of the sum so paid in; and the plaintiff cannot apply that admission to any particular contract he may please to select any more than the defendant:" Taylor on Evid., s. 761. It admits also the validity of every species of claim mentioned in the particulars, and that some damages are due on each: Edgar v. Watson, 1 C. & M. 494. It admits the character in which a plaintiff sues: Lipscombe v. Holmes, 2 Camp. 441, and his sole right to the money sued for: Walker v. Rawson, 5 C. & P. 486; and that the defendants are properly sued jointly: Ravenscroft v. Wise, 1 C. M. & R. 203. It also admits that the action is not brought too soon: Harrison v. Douglas, 3 A. & E. 396; but all such admissions only operate to the amount of the money paid into court: Archer v. English, 1 M. & G. 873. If paid in, on an action on a special count or claim, it admits the contract as charged: Israel v. Benjamin, 3 Camp. 40; M'Cance v. London and North Western Ry. Co., 7 H. & N. 477, and that nominal damages are due on it: Archer v. English, 1 M. & G. 873; and the defendant cannot be allowed to controvert it: Lloyd v. Walkey, 9 C. & P. 771. Still less will he be allowed to give evidence of facts under this plea, even in mitigation of damages, which, if pleaded before, would have been a bar to the action: Speck v. Phillips, 5 M. & W. 279. In an action for use and occupation, it admits plaintiff's sole title: Dolby v. Iles, 11 A. & E. 335. If paid in on a promissory note payable by instalments, it only admits the amount of instalments as due which the money paid in will cover, and does not preclude the Statute of Limitations being pleaded to the others: Reid v. Dickons, 5 B. & Ad. 499.

It is submitted that payment into court may be pleaded to part of the plaintiff's claim: Charles v. Branker, 12 M. & W. 743; Brune v. Thompson, 4 Q. B. 548. Where plaintiff sets out his cause of action in two ways, on either of which he can recover, it is enough to pay money into court on one: Early v. Bowman, 1 B. & Ad. 889; Stafford v. Clark, 2 Bing. 377. Payment into court in actions of tort has the same effects as in actions of contract. It admits a cause of action with damages amounting to the sum paid into court; but it does not necessarily admitthe cause of action stated in the particulars: Schreger v. Carden, 11. C. B. 851; Robinson v. Harman, 1 Ex. 850; Story v. Finnis, 6 Ex. 123. If the claim is general and unspecific, although it admits a cause of action, it does not admit the cause of action sued for, and therefore the plaintiff must give evidence of that cause of action before he can recover larger damages than the sum paid into court: Perren v. The Monmouthshire Ry. and Canal Co., 11 C. B. 855. See the report of this case for a general view of the effect of payment into court in different forms of action. If pleaded as to part, and plaintiff fail on the rest, he must pay costs: Rumbelow v. Whalley, 16 Q. B. 397. A defence in denial of the cause of action will not be allowed with payment into court: Hart v. Denny, 1 H. & N. 609; Spurr v. Hall, 2 Q. B. D. 615; Berdan v. Greenwood, 3 Ex. D. 251. But, quære, and if the clerk receives the money with such a denial, the payment cannot be construed as an admission: Harper v. Davis, 19 Q. B. D. 170. If a person avails himself of payment into court, he cannot afterwards repudiate the effect of it:

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Sections 125-127 Crombie v. Davidson, 19 U. C. R. 369. Payment into court operates as a notice of defence (Rule 20), and can be pleaded in an action of replevin: see Rule 45. As to costs, see section 127. No written plea need be filed. as is required in tender before action.

Clerk to give notice of payment to plaintiff.

126. The clerk having received the necessary postage, shall forthwith send notice of the payment to the plaintiff by post or otherwise to his usual place of abode or of business, and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice the plaintiff signifies in writing to the clerk his intention to proceed for the remainder of the demand claimed, in which case the action shall proceed as if brought originally for such remainder only. R. S. O. 1877, c. 47, s. 90.

Forthwith .- See notes to section 20. As to this notice, see Rule 87 and Form 102. The safer course will be for the clerk to send this notice by registered letter to the plaintiff's address, which the clerk should obtain under Rule 125 on the suit being entered.

The notice must show the place and time of the sittings at which the cause is to be heard: 52 V. c. 12, s. 25; see also section 113 (a).

Within three days after the receipt of the notice .-- See notes to section 123.

In McGregor v. Norton, 13 P. R. 223, the defendant paid a sum of money into court in full satisfaction of the plaintiff's demand under section 125, and the plaintiff was notified thereof. The plaintiff notified the clerk, but not in writing, that he intended to proceed for the remainder of his claim. The defendant was not notified of this and did not attend the trial. Judgment was given for the plaintiff, and the defendant moved for, and was granted, a new trial on terms. Held, that the words of the statute are imperative, and in the absence of written notice all proceedings were stayed. The trial which took place afterwards was therefore a nullity; and prohibition was granted restraining proceedings upon the judgment recovered by the plaintiff at such trial. Held, also, that an application to the inferior court to set aside the judgment was no bar to the motion for prohibition. Semble it was a convenient practice to move in the inferior court.

Plaintiff to ther sum recovered.

127. If the plaintiff recovers no further sum in the pay dofen-dant's costs action than the sum paid into court, the plaintiff shall pay the defendant all costs, charges and expenses incurred by him in the action after such payment, and such costs, charges and expenses shall be duly taxed, and may be recovered by the defendant by the same means as any other sum ordered to be paid by the court. R. S. O. 1877, c. 47, s. 91.

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Recovers.—The word "recovers" here may, it is submitted, be read as "obtains judgment for." The word "recovers" has a technical meaning in law whereby it signifies, to recover by action, and by judgment of the court: Wigens v. Cook, 6 C. B. N. S. 784; Fergusson v. Davison, 8 Q. B. D. 470; Stroud, 660. "But the amount of the verdict is not "recovered" till judgment can be signed upon it:" per Brett, J., Ings v. Lond. & S. W. Ry. Co., L. R. 4 C. P. 17. A plaintiff does not "recover" a sum of money paid in under a successful plea of tender: James v. Vane, 29 L. J. Q. B. 169.

Sections 127-128

Set-off and Statutory Defences.

128. In case the defendant desires to avail himself of Defendant the law of set-off, or of the Statute of Limitations, or of notice of any defence under any other statute having force of law other in Ontario, he shall, at least six days before the trial or defence. hearing, give notice thereof in writing to the plaintiff, or leave the same for him at his usual place of abode if within the division, or, if living without the division, shall deliver the same to the clerk of the court in which the action is to be tried; and in case of a set-off the particulars thereof shall be delivered to the clerk and shall accompany the notice to be given as aforesaid to the plaintiff. R. S. O. 1877, c. 47, s. 92.

Set-off.—Where a defendant desires to avail himself of the law of set-off or the Statute of Limitations, or of any defence under any other statute baving the force of law in this Province, provision is here made for it: Skirving v. Ross, 31 C. P. 423.

"Set-off signifies the subtraction or taking away of one demand from another opposite or cross demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish them both:" Waterman on Set-off, p. 1.

If the defendant's set-off exceeds the plaintiff's recovery, execution may issue for the balance not exceeding \$100: Rule 152.

The defence of set-off was first created by 2 Geo. II, c. 22, s. 13, and 2 Geo. II., c. 24 ss. 4, 5. Division Courts are vested with the same powers as the High Court in all matters of set-off. By counter-claim, also, unliquidated damages may now be set up against debts, and debts against damages, and damages against damages. See Gray v. Webb, 21 Ch. D. 802; see ss. 73, 74.

The distinction between set-off and counter claim is thus defined in Roscoe's N. P. p. 671. "A set-off alleges a liquidated demand due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shows that on the whole account, between the plaintiff and the defendant, nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is therefore a defence to the action." A counter-claim which is a creature of the Judicature Act is on the other hand "in the nature of a cross action by the defendant, which may be made, although in respect of or against a claim for unliquidated damages:" Stooke v. Taylor, 5 Q. B. D. 576 et seq., per Cockburn, C.J.; Baines v. Bromley, 6 Q. B. D. 694, per Brett, L.J.

This distinction is sometimes material, especially with regard to the question of costs as a reference to the cases will show.

The rights of a defendant with regard to the defence of set-off and counter-claim are discussed in the notes to section 73.

Notice of set-off, together with particulars of it, should be given to the plaintiff six clear days (see notes to sections 96 and 125) before the dry appointed for the sittings. It may be left for the plaintiff at his usual place of abode, if such be within the division; or if the plaintiff live without the division the same may be left with the clerk of the court in which the action is to be tried; and particulars of the set-off must also be delivered to the clerk: Rule 128; see Stanton v. Styles, 5 Ex. 578. The clerk must then give the plaintiff notice stating the sittings when the cause will be heard: 53 V. c. 12, s. 25, and Rule 128.

The particulars should be such as not to mislead a reasonable man: Law v. Thompson, 15 M. & W. 545; Prichard v. Nelson, 16 M. & W. 772.

The sum really due must be shewn: Symonds v. Knox, 3 T. R. 65. Interest on the amount of set-off must be claimed in the particulars: Bullen v. Leake, 3rd Ed., title "Particulars of set-off."

Statute of Limitations.—The Statute of Limitations is one of the most usual of statutory defences. The statute commences to run when the right to bring an action has accrued: Colvin v. Buckle, 8 M. & W. 680, and stops on the issue of the summons and during its currency: Turley v. Williamson, 15 C. P. 538; and the process need not be continuously renewed or kept in force: Rule 127; see Harper v. Phillipps, 7 M. & Gr. 396; Whipple v. Manley, 1 M. & W. 432; Pritchard v. Bagshawe, 11 C. B. 459.

It has been said that "a plea of the Statute of Limitations is now considered a defence on the merits:" Archbolds' Prac., 12th Ed. 988; Rucker v. Hannay, 3 T. R. 124; Maddoks v. Holmes, 1 B. & P. 228; Dobie v. Lemon, 12 P. R. 64. But see Brigham v. Smith, 3 Ch. Cham. 313,

The fraudulent concealment by the defendant of the plaintiff's right of action does not prevent the statute running: Imperial Gas Co. v. London Gas Co., 10 Ex. 39. But if the cause of action be one over which the Court of Chancery would have had concurrent jurisdiction the fraudulent concealment of the cause of action would prevent the statute from running: Gibbs v. Guild, 8 Q. B. D. 296; 9 Q. B. D. 53. If a cause of action accrues after the death of a creditor, the statute only commences to run on the appointment of an executor or administrator: Grant v. McDonald, 8 Gr. 468; Atkinson v. Third Equitable Benefit, etc., Society, 25 Q. B. D. 377; Stevenson v. Hodder, 15 Gr. 570; and interest is recoverable for the whole period from the time the cause of action arose: Ib.

If the statute commences to run subsequent disability does not stop it: Rhodes v. Smethurst, 6 M. & W. 351.

In an action for fraudulent misrepresentation it begins to run from the time of the misrepresentation, not from its discovery: Dickson v. Jarvis, 5 O. S. 694; but see Gibbs v. Guild, supra.

All actions of account, or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of action arose.

Actions for rent upon an indenture of demise, actions upon a bond or other specialty, or upon a recognisance must be commenced within 20 years.

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Actions upon an award, when the submission is not by specialty, for an escape, for money levied on execution, within six years. Actions for penalty, damages or sums of money given to the party aggrieved by any statute, within two years: see R.S.O. c. 60.

Section

Actions for rent, which term is made to include all annuities and periodical sums of money charged upon or payable out of any land, and actions for the recovery of land or rent, within 10 years: see R. S. O.,

The time is reckoned exclusively of the day on which the cause of action arose: Freeman v. Read, 4 B. & S. 183. For the purposes of the statute the date of the summons cannot be contradicted: Whipple v. Manley, 1 M. & W. 432.

A solicitor's bill of costs for services rendered in obtaining judgment fer his client will be barred after six years from the entry of judgment: Lizars v. Dawson, 32 U. C. R. 237.

Where the mortgagor is in possession, a mortgage may be presumed satisfied after twenty years from the time fixed for payment of the mortgage money: Doe d. McGregor v. Hawke, 5 O. S. 496.

A cause of action on a covenant to indemnify only accrues on payment under the indemnity and not when made: Ives v. Ives, T. T. 3 & 4 Vic.; Collinge v. Heywood, 9 A. & E. 633; Blyth v. Fladgate, (1891), The court has authority to prevent a solicitor pleading the statute to a just claim: Dougall v. Čline, 6 U. C. R. 546.

If a debt for which a judgment in a foreign country was obtained was barred by the law of that foreign country before action there, the defendant must shew it: Fowler v. Vail, 27 C. P. 417. The action on the judgment would be barred in six years: North v. Fisher, 6 O. R. 206.

The statute does not bar the claim of an executor against the estate of the testator: Emes v. Emes, 11 Gr. 325.

In an action for malicious prosecution the cause of action commences to run from the plaintiff's acquittal of the offence charged: Crandall v. Crandall, 30 C. P. 497.

Where an English Companies' Act makes calls for shares a specialty debt, it does not thereby become a specialty debt of this Province: Barned's Banking Co. (Ltd.) v. Reynolds, 36 U. C. R. 256.

An action for conversion must be brought within six years from the time a cause of action first accrues against the defendant: the fact that the plaintiff had an earlier cause of action for the same chattel against another person from whom the defendant obtained it, is of no consequence: Miller v. Dell, (1891), 1 Q. B. 468.

An action on a covenant in a mortgage is only barred after 20 years: Allan v. McTavish, 2 A. R. 278; McDonald v. Elliott, 12 O. R. 98; but see Sutton v. Sutton, 22 Ch. D. 511; in re Powers. Lindsell v. Phillips, 30 Ch. D. 291; Fearnside v. Flint, 22 Ch. D. 579. Time begins to run from the earliest time when the plaintiff can sue, so that when principal becomes due for default in paying interest, the statute commences: Reeves v. Butcher, (1891), 2 Q. B. 509.

An action on a judgment of a court of record may be brought within 20 years: Boice v. O'Loane, 3 A. R. 167; see Caspar v. Keachie, 41 U. C. R. 599; Price v. Wade 14 P. R. 351. But see Evans v. O'Donnell, 18 L. R. Ir. 170; Jay v. Johnstone, W. N., (1892), 187.

An infant has six years after attaining his majority to bring an action for work and labor performed during his minority: Taylor v. Parnell, 43 U. C. R. 239; R. S. O. c. 60, s. 3.

Where a limitation as to time is specially placed in a statute on the bringing of an action, it supersedes any general limitation: Cairns v. Water Commissioners of Ottawa, 25 C. P. 551; Trotter v. Corp. of Toronto, 29 C. P. 365; Atty. Genl. v. Walker, 3 A. R. 195; Sullivan v. Corp. of Barrie, 45 U. C. R. 12; Watson v. Lindsay, 27 Gr. 253.

A bill of exchange fell due on 1st Dec., 1875, and an action commenced thereon on 1st Dec., 1881, was held in time: Edgar v. McGee, 1 O. R. 287.

In order to keep a claim alive in the Division Court, proceedings must be taken under Rule 127: see also Manby v. Manby, 3 Ch. D. 101.

A settlement of partnership accounts cannot be opened up after six years: Cotton v. Mitchell, 3 O. R. 421. But where there is a discontinuance of the partnership without any dissolution or winding up the affairs, six years forms a bar to an action to dissolve the partnership and take the accounts: Knox v. Gye, L. R. 5 H. L. 656; Noyes v. Crawley, 10 Ch. D. 31, where Miller v. Miller, L. R. 8 Eq. 499, is held to be overruled.

Payment of interest on a demand note is evidence of a demand from which time the statute would run; Brown v. Rutherford, 14 Ch. D. 687.

A person entitled to letters of administration of a deceased may bring an action before obtaining such letters and prevent the Statute of Limitations from being a bar: Trice v. Robinson, 16 O. R. 433; Chard v. Rae, 18 O. R. 371.

The statute is not a bar to a set-off unless the six years have expired before the action is brought: In re Ballard. Lovell v. Forester, W. N., (1890), 64.

In an action against a solicitor for negligence,—Held, that the right of action arose when the negligent act was committed and not when it was discovered by the client: Wood v. Jones, 61 L. T. N. S. 551; Armstrong v. Milburn, 54 L. T. N. S. 723: Dooby v. Watson, 39 Ch. D. 178; Blyth v. Fladgate, (1891), 1 Ch. 362. But when damage is the gist of the action, the time runs from the accrual of such damage: Bean v. Wade, 1 C. & E. 519.

What acknowledgment sufficient.—To take a case out of the statute by a subsequent promise to pay, slight evidence is sufficient, but this recognition of liability must be unequivocal, or the promise must be unconditional, or the condition performed: Carpenter v. Vanderlip, E. T. 3 Vic.; Spalding v. Parker, 3 U. C. R. 66; Gratham v. Powell, 6 U. C. R. 494; Myerhoff v. Froelich, 3 C. P. D. 333; 4 C. P. D. 63; Cowing v. Vincent, 29 U. C. R. 427; Smith v. Burn, 30 C. P. 630; Cameron v. Campbell, 7 A. R. 361; Cook v. Grant, 32 C. P. 511; Re Ross, 29 Gr. 385; Re Kirkpatrick, Kirkpatrick v. Stevenson, 3 O. R. 361. "The legal effect of such an acknowledgment is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense and for that purpose it may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him:" per Wigram, V.-C., Philips v. Philips, 3 Hare, 281, 299, 300. This, in effect, is the law as stated in Tanner v. Smart, 6 B. & C. 603, overruling many previous cases, and which has been followed in Buckmaster v. Russell, 10 C. B. N. S. 745; Chasemore v. Turner, L. R. 10 Q. B. 500; and other cases cited infra.

128

Section

In order to take a case out of the statute, the promise must now be in writing: R. S. O. c. 123.

An account stated by an executor of a debt due by his testator, which had never, before such accounting, been ascertained or determined, was held sufficient to charge the executor as for a substantive debt, without any express promise to pay: Watkins v. Washburn, 2 U. C. R. 291.

The following have been held to be cases of sufficient acknowledgment under the statute: Depositions in another action: Roblin v. Mc-Mahon, 18 O. R. 219; Smith v. Poole, 12 Sim. 17. A letter from the defendant in which he said, "I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up, which will not be before the last of March or the beginning of April;" there being evidence also that the son's estate had been wound up: Roblin v. McMahon, 18 O. R. 219. An acknowledgment made and signed in the testimony of defendant on his examination in a ce tain action for the administration of his son's estate in which he admitted the receipt of the money and his liability to the testator of the plaintiff for it: Ib. Promising to have the amount placed to plaintiff's credit: Jones v. Brown, 9 C. P. 201. A letter written in following words: "I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavor to send you a little next week:" Lee v. Wilmot, L. R. 1 Ex. 364. Also the following letter: "I shall be obliged to you to send in your account made up to Xmas last. I shall have much work to be done this spring, but cannot give further orders until this be done." Again: "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week: Quincey v. Sharpe, 1 Ex. D. 72. "I return to Shepperton about Easter. If you send me these particulars of your account with vouchers I shall have it examined and cheque sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim: "Skeet v. Lindsay, 2 Ex. D. 314; also, "The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps in the meantime you will let your clerk send in an account of how it stands:" Chasemore v. Turner, L. R. 10 Q. B. 500.

Such expressions in a letter as "You will certainly be paid;" "Wait a little and all will be right;" amount to a promise though the letter may also explain the source from which the writer expects to obtain funds: Collis v. Stack, 1 H. & N. 605.

It has been held that a letter with a request "to send in your account" is sufficient: Curwen v. Milburn, 42 Cb. D 424, affirmed ou another ground in the Court of Appeal; see also Banner v. Berridge, 18 Ch. D. 254: even though coupled with a denial of the correctness of the amount: Skeet v. Lindsay, 2 Ex. D. 314: see, however, Spong v. Wright, 9 M. & W. 629. And a general admission of some debt being due, coupled with evidence to prove the amount, is sufficient: Cheslyn v. Dalby, 4 Y. & C. 238; Waller v. Lacy, 1 M. & Gr. 54.

It has been said that stronger words would be required to establish a debt already barred than to keep one alive which has not been barred: per Pollock, C.B., Cornforth v. Smithard, 5 H. & N. 13.

A settlement and statement of accounts appear to create a new cause of action: House v. House, 24 C. P. 526.

And an acknowledgment of the debt raises an implied promise to pay: Lyon v. Tiffany, 16 C. P. 197.

A letter written by defendant to plaintiff as follows: "The greatkindness of your father on every occasion, and more especially the money

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that he loaned me to purchase my seat on the New York Stock Exchange, place me now in your debt. I must now leave it entirely to your generosity whether you will have me liquidate the loan I have mentioned on the sale of my seat in New York," was held sufficient, the writer having sold his seat: Buccleugh (Duke) v. Eden, 61 L. T. N. S. 360.

What acknowledgment not sufficient.—The promise must not be uncertain: Dougall v. Cline, 6 U. C. R. 546.

An admission by an executor that a note barred by the statute is due, coupled with a statement that it could not be paid for want of assets, and that if there were assets it should be paid, is a conditional promise merely, and not sufficient: Lampman v. Davis, 1 U. C. R. 179; see also McCormack v. Berzey, 1 U. C. R. 388.

Formerly the latter items of a running account drew the others with them so as to defeat the operation of the statute: Kings College v. McDougall, 5 U. C. R. 148. But it is not so now: R. S. O. c. 60, s. 2. And a promise to pay by one of several joint and several makers of a note would formerly take the case out of the statute: Sifton v. McJabe, 6 U. C. R. 394; but not now: R. S. O. c. 123, s. 2; Wolmershausen v. Wolmershausen, 62 L. T. N. S. 541,

The following are given as instances of letters which were held not to imply a promise to pay so as to overcome the effects of the statute:

"I received your letter dated January 31. 1 am sorry to say I cannot do anything for you at present, but shall remember you as soon as possible: "Gemmell v. Colton, 6 C. P. 57.

"I thank you for your kind intentions to give up the rent of T. B. next Christmas, but I am happy to say at that time both principal and interest will have been paid in full:" Green v. Humphreys, 26 Ch. D. 474.

"I cannot afford to pay my new debts, much less my old ones:"
Knott v. Farren, 4 D. & Ry. 179. "I will see my attorney, and tell
him to do what is right:" Miller v. Caldwell, 3 D. & Ry. 267. "I
know that I owe the money but the bill I gave was on a 3d. receipt
stamp, and I will never pay it:" A'Court v. Cross, 3 Bing. 329. "Since
the receipt of your letter (and indeed for some time previously) I have
been in almost daily expectation of being enabled to give a satisfactory
reply to your application respecting the demand of Messrs. M. against
me. I propose being in Oxford to-morrow, when I will call upon you on
the matter:" Morrell v. Frith, 3 M. & W. 402. "Send me your bill, and,
if just, I will not give you the trouble of going to law:" Spong v.
Wright 9 M. & W. 629. "I w ll send you a cheque as soon as I can:"
Re Bethell. Bethell v. Bethell, 34 Ch. D. 561; see also Jupp v. Powell, 1
C. & E. 349, affirmed by C. A. See, however, Quincey v. Sharpe, 1 Ex.
D. 72; and Skeet v. Lindsay, 2 Ex. D, 314, ante p. 183.

The writing must import a distinct and unqualified acknowledgment of a debt, from which a promise may be inferred by the court: Fern v. Lewis, 6 Bing, 349; Williams v. Griffiths, 3 Ex. 335; Green v. Humphreys, 26 Ch. D. 474.

An acknowledgment coupled with the statement that the debt is paid or discharged must be taken together and is not sufficient, as, for instance, a statement that, "I have paid the debt and will send you a copy of the receipt:" the copy not being sent, was held insufficient: Birk v. Guy, 4 Esp. 184. And so where the acknowledgment relied on was "You owe me more money; I have a set-off against it:" Swann v. Sowell, 2 B. & A. 759; and "I acknowledge the receipt of the money, but the testatrix gave it me:" Owen v. Wolley, B. N. P. 148.

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Where the language of the acknowledgment is ambiguous or doubtful it is a question for the court and not the jury to determine whether the instrument relied on is sufficient or not; but if extrinsic facts are adduced in explanation, these facts are for the consideration of the jury: Morrell v. Frith, 3 M. & W. 402; Routledge v. Ramsay, 8 A. & E. 221; Smith v. Thorne, 18 Q. B. 134. But formerly it was held to be a question of fact for the jury: Lloyd v. Maund, 2 T. R. 760; Linsell v. Bonsor, 2 N. C. 241.

The acknowledgment must be made before the action is brought: Bateman v. Pinder, 3 Q. B. 574.

An agreement to refer disputed accounts to an arbitrator, "to ascertain the amount due" the amounts to be paid "at such times and in such proportions as the arbitrator may appoint" is not sufficient: Hales v. Stevenson, 11 W. R. 33, 952.

A promise given by one of several parties to pay his share of the debts of the firm who offered as a composition one-third of the debt (there having been three members of the firm) is not sufficient to charge him in an action against the firm: Barnes v. Metcalf, 17 U. C. R. 388.

Mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt: Emes v. Emes, 11 Gr. 325.

Where a debt, the remedy for which was barred, was acknowledged by the debtor and judgment was recovered therefor, a voluntary settlement made before the acknowledgment and before the remedy was barred, was held void as against an execution on the judgment: Irwin v. Freeman, 11 Gr. 465.

A letter written "without prejudice" cannot be used to take a case out of the Statute of Limitations, unless the plaintiff accedes to its terms: In re River Steamer Co., Mitchell's Claim, L. R. 6 Ch. 822; Vardon v. Vardon 6 O. R. 719; Omnium Sec. Co. v. Richardson, 7 O. R. 182; Pirie v. Wyld, 11 O. R. 422; Walker v. Wilsher, 23 Q. B. D. 335.

Acknowledgment—to whom made.—An acknowledgment of a debt, not being a debt by specialty, to be sufficient under the Statute of Limitations must be made to the creditor or his agent. A general acknowledgment to a third person will not be sufficient: Goodman v. Boyes, 17 A. R. 528; Tanner v. Smart, 6 B. & C. 603; Rogers v. Quinn, 26 L. R. Ir. 136.

Acknowledgment by part payment.—A payment to take a case out of the statute must be clear and distinct: Notman v. Crooks, 10 U. C. R. 105. Payments should, in the absence of specific directions by the creditor, be applied on the earlier items of an account, not barred at the time of payment, but before suit had subsequently become so: Cathcart v. Haggart, 37 U. C. R. 47.

The payment must be made on account of the debt sued for: Morgan v. Rowlands, L. R. 7 Q. B. 493, and cases cited.

Payment of interest revives the principal: Wilson v. Rykert, 14 O. R. 188; and a compulsory payment of interest does not save the statute: Ib. The payment must be such as to warrant the jury in inferring an intention to pay the rest: Boultbee v. Burke, 9 O. R. 80; and if the defendant on making a part payment should say that, "he owes the money, but will not pay it," it will not be sufficient unless the

Section 128 Section jury think the words were spoken in jest: Wainman v. Kynman, 128 1 Ex. 118.

Payment to an assignee, after assignment, cannot be used as an acknowledgment by the assignee: Stamford, Spalding & Boston Banking Co. v. Smith, 40 W. R. 48.

If there are two debts and a payment is made generally, it is for the Judge, or if a jury, for them to say whether or not there is a payment on each of them: Walker v. Butler, 6 E. & B. 506; or they may be appropriated to the whole indebtedness: Catheart v. Haggart, 37 U. C. R. 47; Stewart v. Gage, 13 O. R. 458.

The creditor cannot, without the debtor's knowledge or assent, appropriate a payment to any particular debt to take it out of the statute; but it ought prima facie to be taken as paid on the debt not barred; Nash v. Hodgson, 25 L. J. Ch. 186; 6 DeG. M. & G. 474, 482.

The following have been held not to be such payments as are required to take the debt out of the statute: Payment of a dividend by an assignee under the Insolvent Act: Davies v. Edwards, 7 Ex. 22; nor payment by the inspectors of the debtors' inspectorship deed: Ex parte Topping, 34 L. J. Bky. 44; nor payment under a judgment in a defended County Court action: Morgan v. Rowlands, L. R. 7 Q. B. 493. The payment may be made by bill or note: Turney v. Dodwell, 3 E. & B. 136; and it operates from the delivery and not from the falling due of the bill: Irving v. Veitch, 3 M. & W. 90.

It is not necessary that money should pass if the transaction amounts to payment; Maber v. Maber, L. R. 2 Ex. 153; House v. House, 24 C. P. 52b; see Amos v. Smith, 1 H. & C. 238.

If a psyment of part is made as the whole amount due, it does not take the rest of the claim out of the statute: Waugh v. Cope, 6 M. & W. 824.

A payment on a collateral security would be sufficient: Slater v. Mosgrove, 29 Gr. 392.

A payment made by a third person on account of the debtor to the creditor cannot be appropriated by the latter so as to bar the statute: Waller v. Lacy, 1 M. & G. 54. Part payment can be proved by the oral admission of the defendant: Cleave v. Jones, 6 Ex. 573; but see S. C. 7 Ex. 421; or by his pleadings in Chancery: Baildon v. Walton, 1 Ex. 617.

Payment of interest by a devisee for life, on a simple contract debt of his testator is sufficient to keep the debt alive against all persons entitled in remainder: Re Hollingshead. Hollingshead v. Webster, 37 Ch. D. 651.

Payment of interest by a principal will prevent the bar applying to the liability of a surety: Allison v. Frisby, 43 Ch. D. 106; but **ee* Paxton v. Smith, 18 O. R. 178, in which the principal and surety were joint makers of a note.

While a payment is made by one of two joint debtors, with the know-ledge and consent of the other, the operation of the statute in favour of the latter is not prevented: Jackson v. Woolley, 8 E. & B. 783.

Where the defendant authorized an agent to offer plaintiff a part of the debt in discharge of the whole and the agent exceeded his authority and paid the sum offered in part discharge, it was held that it did not bar the statute: Linsell v. Bonsor, 2 N. C. 241. But, generally, payment by an authorized agent is payment by the principal, and the authority is a question for the jury: Roscoe's N. P. 653.

In order to render the crediting of an account against the plaintiff evidence of payment by him of so much on an account due to the plaintiff so as to take the case out of the statute, it must appear that the Kynman,

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e plaintiff the plainr that the defendant clearly assented to its being considered a payment: Ball v. Parker, 39 U. C. R. 488; 1 A. R. 593.

An executor may, in his discretion, pay a debt barred by the Statute of Limitations: Lowis v. Rumney, L. R. 4 Eq. 451. He may waive the statute: Alston v. Trollope, L. R. 2 Eq. 205.

Where part of plaintiffs own demands stated in his particulars are barred by the statute, he has a right to place against these the items of credit appearing in his particulars to be beyond six years: Ford v. Spafford, 8 U. C. R. 17.

A debtor unable to pay his debts from his own money, paid within three months of his being adjudged a bankrupt part of a debt barred by the Statute of Limitations, with the object of renewing the debt and enabling the creditor to prove in the bankruptcy for the balance due. The debt had always been treated by the debtor and the creditor as a subsisting debt, and one which it was intended should be ultimately paid. Held, that there was a sufficient part payment to take the debt out of the statute: In re Lane, ex parte Gaze, 23 Q. B. D. 74.

Trustees.—The Statutes of Limitation apply now to any executors, administrators and trustees, except, (1) where the claim is founded upon any fraud or fraudulent breach of trust to which he was party or privy; (2) where the claim is to recover trust property, or the proceeds thereof, still retained by him or previously received by him and converted to his use: 54 V. c. 19, s. 13.

Where no existing Statute of Limitations applies, the trustee or person claiming under him, is at liberty to plead the lapse of time as a bar in like manner, and to the like extent, as if the claim had been in an action of debt for money had and received: Ib. See this provision applied: Re Bowden, Andrew v. Cooper, 45 Ch. D. 444. Re Swain, Swain v. Bringeman, (1891), 3 Ch. 233.

An innocent partner in a solicitor's firm may avail himself of this section in an action as to the investment of client's moneys: Moore v. Knight, (1891), 1 Ch. 547.

Except where this statute is applicable, no claim of a cestui que trust against his trustees for any property held on an express trust or in respect of any breach of such trust, is barred by any Statute of Limitations: R. S. O. c. 44, s. 53, s-s. 1. See Cook v. Grant, 32 C. P. 511; Coyne, v. Broddy, 15 A. R. 159. And a claim against an agent of a trustee for money received by him with notice of the trust would not be barred: Re Bell. Lake v. Bell, 34 Ch. D. 462.

Statutory defence.—The defence to an action on a solicitor's bill of costs, that no signed bill delivered, is a statutory defence, and notice must be given: Lane v. Glenny, 7 A & E. 83; Robinson v. Roland, 6 Dowl. 271; 7 U. C. L. J. 135; R. S. O. c. 147, s. 31; Scane v. Duckett, 3 O. R. 370.

129. No evidence of set-off shall be given by the Evidence defendant except such as is contained in the particulars of set-off delivered. R. S. O. 1877, c. 47, s. 93.

Evidence of set-off.-The Judge has, of course, the power to allow an amendment of the particulars: see Rule 140 and section 118.

130. If the set-off, proved to the satisfaction of the Provisions Judge, exceeds the amount shewn to be due to the plaintiff, amount the plaintiff shall be non-suited or the defendant may elect due to plaintiff,

to have judgment for the excess, provided the excess be an amount within the jurisdiction of the court, and if the excess be greater in amount than the jurisdiction of the court the Judge may adjudicate that an amount of the setoff equal to the amount shewn to be due to the plaintiff be satisfied by the claim but the adjudication shall be no bar to the recovery by the defendant in a subsequent action for the residue of the set-off. 43 V. c. 8, s. 55.

The court would be compelled, under this section, to determine the question of the plaintiff's liability on the set-off to an amount beyond the jurisdiction, if necessary. The section was passed to get over the diffi-culty created by the case of re Mead v. Creary, 32 C. P. 1. Section 74 would seem to apply the same rule to counter-claims. Where a crossclaim by the defendant is really a set-off, though called a counter-claim, the defendant is not entitled to costs as of a counter-claim, but only to the costs as of defence, viz: of the extra expense of trying the issues upon which he succeeds, if he does not succeed in extinguishing plaintiff's claim in full: Cutler v. Morse, 12 P. R. 594; Bennett v. White, 13 P. R. 149; Sanderson v. Ashfield, 13 P. R. 230; Myers v. Defries, 4 Ex. D. 180; Stooke v. Taylor, 5 Q. B. D. 569; Abbott v. Andrews, 8 Q. B. D. 648.

WITNESSES AND EVIDENCE.

Subpænas.

Parties

131. Any of the parties to an action may obtain, from may obtain the clerk of any Division Court in the county, a subpœna with or without a clause for the production of books, papers and writings, requiring any witness, resident within Province or served with the subpœna therein, to at a specified court or place before the Judge, or any at trator appointed by him under the provision hereinafter contained, and the clerk, when requested by any party to an action, or his agent, shall give copies of such subpœna. R. S. O. 1877, c. 47, s. 95; 49 V. c. 15, s. 9.

> May obtain.—Formerly it was necessary to issue a subpœna from the High Court of Justice in any Division Court suit where the party proposed to be subpænaed resided outside the county. But it is not so now. It will be observed that a subpoena need not be issued from the office in which the suit is entered, but may be obtained from the clerk of any Division Court in the county in which the action is brought.

A subpœna.—For form of subpœna, see Form No. 38.

A party who desires witnesses to attend at the sittings should subpoena them. The duty of attending is created by the service, and by that means only. Formerly a witness, even if found in court, might refuse

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to be sworn unless subpœnaed: Bowles v. Johnson, 1 W. Bl. 36; but under section 133, every person in court must give evidence if called upon. It seems that any witness is now entitled to be paid for his expenses and loss of time before giving evidence: In re Working Men's Mut. Society, 21 Ch. D. 831.

Section 131

It is very questionable whether or not the writ can be issued in blank: Barber v. Wood, 2 M. & Rob. 172.

The subpœna must name the place of trial: Milson v. Day, 3 M. & P. 333; and the parties to the cause: Doe d. Clarke v. Thomson, 9 Dowl. 948.

If notice of change of place is posted up at the place designated in subpœna, witness is bound to attend at the other place: Chapman v. Davis, 1 Dowl. N. S. 289.

It extends to the whole sittings if more days than one: Scholes v. Hilton, 10 M. & W. 15.

The names of all witnesses should be inserted in the original: Mullett v. Hunt, 1 C. & M. 752; and any number may be inserted in it: section 132.

A witness ordinarily resident in a foreign country may to served here with a subpena, and is liable for non attendance. If the conduct money paid him is insufficient he must object at the time of the payment: Comstock v. Harris, 12 P. R. 17.

It need not be personally served but may be left at the "usual place of abode" of the witness: section 133—except perhaps for the purpose of bringing a witness into contempt (as to which see notes to section 99, ante), and for that purpose the original should be proved to have been shewn to the witness: Pitcher v. King, 2 D. & L. 755; Blakeley v. Blaase, 12 P. R. 565; even if an attorney: Smith v. Truscott, 6 M. & G. 267: but in any case if the witness requires to see it a reasonable time afterwards (see notes to section 117), and is refused, service is defective: Westley v. Jones, 5 Moore, 162. The copy must in all cases be left with, and not merely shewn to, the witness: Thorpe v. Gisborne, 11 Moore, 55; In re Holt, W. N. (1879) 48; and there must be no mistake in the day; Doe d. Clarke v. Thompson, 9 Dowl. 948. Service is not effective without the necessary witness fees being paid or tendered: Fuller v. Prentice, 1 H. Bl. 49. The fees include expenses of going to, staying at, and returning from the trial: Ib.; Newton v. Harland, 1 M. & G. 956; also see Tariff of Witness Fees. If the attendance of the witness becomes unnecessary by settlement of the case or otherwise, and he is informed of it before expenses incurred, the sum may be recovered back: Martin v. Andrews, 7 E. & B. 1. The fees are fixed by tariff, and no distinction can properly be made in Division Courts in amount as to any class of witnesses, except under section 134. If a larger sum than what a witness is entitled to is hone fide demanded, he will not be brought into contempt: Newton v. Harland, supra. If a party refuse money tendered him, saying he will pay his own expenses, he is subject to the same consequences as if paid: Gough or Goff v. Miller or Mills, 2 D. & L. 23. The fee need not be tendered to the witness at the time of service; a reasonable time before the sittings is sufficient: Webb v. Page, 1 C. & K. 23. Where a witness had been brought to the place of trial by one party, the other, finding him there, subposnaed him, it was held that without tender of expenses he could do so: Edmonds v. Pearson, 3 C. & P. 113; and that the witness could not refuse to be cross-examined on that account: Ib. In a later case, however, it was held that the party calling him was bound to pay all his expenses: Allen v. Yoxall, I C. & K. 315. Service must be made a reasonable time before the trial: Barber v. Wood, 2 M. & Rob. 172. What is reasonable must depend on the circumstances of each case: Maunsell v. Ainsworth, 8 Dowl. 869; and is in all cases

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a question for the court: Barber v. Wood, supra. If notice is given witness that cause not yet tried, he is bound to attend, though after the day mentioned in subpœna: Davis v. Lovell, 4 M. & W. 678; but see Grantham v. Bishop, 1 C. P. 237; though not sufficient to bring him into contempt: Alexander v. Dixon, 1 Bing. 366. Service may be made any hour of the day or night, but not on Sunday: R. v. Leominster, 2 B. & S. 391, and cases cited. If the witness be a married woman, the money should be tendered her, and not her husband: Arch. Prac. 12th Ed. 351. A witness may also maintain an action for his fees against the party who subpoenced him, though he refuses to give evidence because such fees are not paid him, and he was thereupon not examined: Hallet v. Mears, 13 East, 15; Pell v. Daubeny, 5 Ex. 955. The solicitor is not responsible unless he agreed to be: Robins v. Bridge, 3 M. & W. 114. A witness should be served a reasonable time to allow him to put his affairs in order: Hammond v. Stewart, 1 Str. 510; but urgent domestic business is no excuse: Gough or Goff v. Miller or Mills, 2 D. & L. 23. A summons may be served in a court of justice on a party subpossed to give evidence in his own cause: Poole v. Gould, 1 H. & N. 99. Difficulty in serving does not dispense with the necessity of service: Barnes v. Williams, 1 Dowl. 615. If witness paid by both parties, neither can recover it back: Crompton v. Hutton, 3 Taunt. 230. A party to a cause, about to attend the trial on his own account, has no right to conduct money or expenses when subpoenced by the other side: Reed v. Fairless, 3 F. & F. 958. A party to a cause is not entitled to his fees as a witness unless he expressly attended to give evidence on his own behalf, and not to superintend the cause: Howes v. Barber, 18 Q. B. 583, and the affidavit of disbursements should distinctly show that fact. It is not a general rule in England that parties, if witnesses, are to have an allowance for their attendance on their own behalf: Dowdell v. Australian Royal Mail Steam Nav. Co., 3 E. & B. 902. A witness should be called on his subpoena: R. v. Stretch, 3 A. & E. 503; Dixon v. Lee. 3 Dowl. 259. But if it can be shewn he did not attend it is sufficient: Goff v. Mills, 2 D. & L. 23. It is a sufficient excuse that he was too ill to attend: Jacobs, In re, 1 H. & W. 123; Scholes v. Hilton, 10 M. & W. 15; but it is no excuse that he would have been in time if a previous cause on the list had not anexpectedly gone off; R. v. Fenn, 3 Dowl. 546; and that another person had answered for him and would have fetched him in a few minutes. Before proceedings for contempt can be taken, it must appear that he was a material witness: Tinley v. Porter, 2 M. & W. 822. To sustain an action against witness, if party cannot proceed with trial, it is sufficient without calling jury or otherwise entering on the trial: Lamont v. Crook, 6 M. & W. 615. If a witness has received full fees from one side, and, when served with subpœna on the other, consents to receive a nominal sum, he is still liable to the latter if he does not attend: Bettelev v. McLeod, 3 Bing. N. C. 405, but actual damage must be shewn in any case: Couling v. Coxe, 6 C. B. 703; Yeatman v. Dempsey, 9 C. B. N. S.

No privilege attaches to telegrams in the possession of a telegraph company, and when a telegraph operator was subpensed to produce certain telegrams which, upon his examination, he stated had been burnt in accordance with instructions received from the general manager of the company it was held that the manager and operator were guilty of a contempt of court; Re Dwight and Macklam 15 (). R. 148. The operator was the proper person to subpens to produce the telegrams, as he had control of them and ability to produce them: Ib.

Privilege from arrest.—A witness going to or returning from a trial is privileged from arrest on civil process: Montagu v. Harrison, 3 C. B. N. S. 292; Atty.-Gen. v. Leathersellers Co., 7 Beav. 157; but not from

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m a trial is n, 3 C. B. t not from an arrest on criminal process: Lord Wellesley's Case, 2 Rus. & Myl. 639; or for a contempt of court; Re Freshton, 11 Q. B. D. 556.

A warrant for the arrest of a witness issued by a justice in default of distress for non-payment of rates is civil process, and the court, before which the witness is to appear or has appeared, may order his discharge: Hobern v. Fowler, 9 T. L. R. 6.

Witness in gaol.—A writ of habeas corpus may be obtained for the attendance of a witness who is confined in prison. The party requiring him will, however, be ordered to pay all expenses: Spellman v. Spellman, 10 C. L. T. 20.

False affidavit of disbursements.—Where a party has falsely sworn that witnesses have been paid, and the same are taxed and paid to him, he will be ordered to refund the amount: Howick v. Township of Romney, 11 C. L. T. 329; Harding v. Kraust, 12 C. L. T. 493.

Hostile witness.—A witness, who, in the opinion of the Judge, proves adverse, may be contradicted by the evidence; or, by leave of the Judge, an inconsistent statement made at other times may be proved, but the circumstances of such statement sufficient to designate the particular version, must be mentioned to the witness, and he must be asked whether or not he made such statement: R. S. O. c. 61, s. 20.

The Judge may give leave to the party producing a witness who proves hostile, to put leading and pressing questions; Greenough v. Eccles, 5 C. B. N. S. 780; see Taylor on Evi., 1197.

But he cannot receive other evidence to prove that the witness is adverse. His discretion must be principally, if not wholly, guided by the witnesses' behaviour and language in the witness box; and his exercise of the power is absolute and cannot be reviewed: Price v. Howard, 16 (J. B. D. 681.

The opposite party may be asked leading questions as a matter of right: Clarke v. Saffery, Ry. & M. 126.

Production of books, etc.—This is called a duces tecum. A witness called to produce a document need not be sworn; nor unless made a witness in the ordinary way can be be cross-examined: Perry v. Gibson, 1 A. & E. 48; and if sworn by mistake the same rule applies: Rush v. Smith, 1 C. M. & R. 94. It is incumbent on the party to bring the "books, papers, and writings" with him, and if he does not he is prima facie in default: Amey v. Long, 9 East, 473. Having a lien on them was held no excuse for not producing them: Thompson v. Mosley, 5 C. & P. 501, sed quære; see Kemp v. King, 2 Moo. & Rob. 437; Doe v. Ross, 7 M. & W. 102; ex parte Paine & Layton, L. R. 4 Ch. 215; nor can he shew that the document was not material: Doe v. Kelly, 4 Dowl. 273. If a witness who is sworn has a document with him in court, he is bound to produce it, though not served with a subpæna duces tecum: Snelgrove v. Stevens, Car. & M. 508; Farley v. Graham, 9 U. C. R. 438. A servant cannot be brought into contempt for not producing books and papers of his master in his possession, which the master will not allow him to bring: Crowther v. Appleby, L. R. 9 C. P. 23, and cases cited: see In re Emma Silver Mining Co., L. R. 10 Ch. 194. The remarks made in the previous note have application here also. As to corroboration of witness, see Findley v. Pedan, 26 C. P. 483; and recalling him, which is in the discretion of the Judge: Gleason v. Williams, 27 C. P. 93.

The court will excuse production if the disclosure would subject the party to a criminal charge or penalty: Whitaker v. Izod, 2 Taunt. 115; Hall v. Gowanlock, 12 P. R. 604; but not unless the party from whom the disclosure is sought, will pledge his oath to the best of his belief that

Section 131 Sections the production would tend to criminate him: Webb v. East, 131-132 5 Ex. D. 108.

All other documents, relevent to the issue, must be produced, except such as contain professional communications of a confidential character for the purpose of obtaining legal advice between counsel, or solicitor and client, or information obtained by the solicitor, or an agent employed by him, or by the client on his recommendation, for the purpose of litigation: Bustros v. White, 1 Q. B. D. 423; Anderson v. Bank of B. C., 2 Ch. D. 664; McCorquodale v. Bell, 1 C. P. D. 471: Friend v. Lond. Chat. & Dover Ry. Co., 2 Ex. D. 437; Lyell v. Kennedy, 27 Ch. D. 1; Wheeler v. La Marchant, 17 Ch. D. 675; Westinghouse v. Midland Ry. Co., 48 L. T. N. S. 462: Betts v. G. T. Ry. Co., 12 P. R. 86, 634; O'Shea v. Wood, (1891), P. 286.

The following have been held to be privileged communications:-

Confidential communications between solicitor and client: Minet v. Morgan, L. R. 8 Ch. 361. Information obtained by the client for the purpose of obtaining his solicitor's opinion thereon; Southwark and Vauxhall Water Co., v. Quick, 3 Q. B. D. 315. Information voluntarily given by a third person to the solicitor: Young v. Holloway, 12 P. D. 167. The draft of a witness's evidence which has been prepared by a solicitor for insertion in counsel's brief: Taylor on Evi., s. 932, n.

The following were held not to be privileged communications:

The evidence of solicitors as to statements made to them, by a person in his lifetime, as to his intentions with regard to land made, in the solicitor's office, in the presence of another person not a solicitor, and which was not followed by professional employment: Rudd v. Frank, 17 O. R. 758.

A communication made by one of the solicitors in an action to an arbitrator in the same action: Conmee v. C. P. Ry. Co., 9 C. L. T. 36.

The transcript of a shorthand note of evidence and arguments taken as a reference: Rawstone v. Preston Corp., 30 Ch. D. 116.

Or notes of proceedings in open court: Nicholls v. Jones, 2 H. & M. 588: Robson v. Worswick, 38 Ch. D. 370.

See notes to section 111.

Setting aside subpoena.—A subpoena duces tecum requiring the production of irrelevant documents will be set aside as oppressive: Steele v. Savory, W. N., (1891), 195; 8 T. L. R. 94.

Service of subpæna, by whom made. 132. Any number of names may be inserted in a subpœna, and service thereof may be made by any literate person, and proof of the due service thereof, together with the tender or payment of expenses, may be made by affidavit, and proof of service may be received by the Judge, either orally or by affidavit. R. S. O. 1877, c. 47, s. 96.

Any literate person.—See notes to sections 99 and 111 as to mode of service and by whom served: and also notes to section 131.

Proof of due service.—As to proof of service see notes to section 99.

Payment of expenses.—These are regulated by the tariff. The Division Court tariff prescribes the limit of allowances to all classes of witnesses resident in the County; see Dartnell v. the Sessions of Prescott and Russell, 26 U. C. R. 480. But architects are entitled when summoned to give evidence in their professional capacity, or in consequence of

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professional services rendered, in addition to travelling expenses, to \$5 Sections per day: 53 Vic. c. 41, s. 29; R. S. O. c. 152, s. 25.

By affidavit.-It is submitted that the best proof, and what would be a proper record of the facts, would be by affidavit.

133. Every person served with a copy of a subpoena Penalty for disobeying either personally or at his usual place of abode, and to subpose, whom at the same time a tender of payment of his lawful to be when the same time at the same expenses is made, who refuses or neglects without sufficient cause to obey the subpœna, and also every person in court called upon to give evidence, who refuses to be sworn (or affirm where affirmation is by law allowed) or to give evidence, shall pay such fine not exceeding \$8 as the Judge may impose, and shall, by verbal or written order of the Judge, be, in addition, liable to imprisonment for any time not exceeding ten days; and the fine shall be levied and collected with costs, in the same manner as fines imposed on jurymen for non-attendance, and the whole or any part of the fine, in the discretion of the Judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the consolidated Revenue Fund R. S. O. 1877, c. 47, s. 97.

Usual place of abode.—See notes to sections 81 and 99. The service need not be personal; but it is better that it should be so wherever possible. Personal service is generally necessary when it is sought to charge the person served, with contempt. See notes to section 131. But neglect or refusal without just cause to obey the subpœna would be punishable as this section directs in every case where the requirements of the section have been complied with, and the person subpænaed has been tendered his lawful fees at the time of service or a reasonable time thereafter. The service should be a reasonable time before the sittings so as to allow the witness an opportunity of making preparation, either in his business affairs or otherwise, to attend court. He would not be treated as in contempt if it appeared that such was not done.

Lawful expenses.—See notes to section 132.

Sufficient cause. - What is sufficient cause must depend on the circumstances of each particular case: Stroud, 773, 774.

Every person in Court, etc.—Any person in court may be called upon to give evidence in a case. But if a witness were subposnaed and was not paid his witness fees, and he attended notwithstanding, he could not be called upon to give evidence by the party who had not subpænaed him, unless such witness fees were first paid : see In re Working Men's Mut. Socy., 21 Ch. D. 831, cited in note to section 131, ante pp. 188, 189.

To be sworn (or affirm, etc.),-"All witnesses ought to be sworn according to the peculiar ceremonies of their religion, or, in such manner as they deem binding on their consciences:" Taylor on Evi. 8th ed. D.C.A.-18

Sections 1179; and if the oath be dispensed with it can only be by authority of an Act of Parliament: Maden Catenach, 7 H. & N. 360: Ormichund v. Barker, 1 Smith's, L. C. 7th. ed. p. 455; Miller v. Salomons, 7 Ex. **534**, 538.

As to form of oaths see Form No. 110, and Rule 134.

In R. v. Pah-Mah-Gay, 20 U. C. R. 195, on a trial for murder, an Indian witness was offered, and, on his examination by the Judge, it appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being, who created all things, and in a future state of rawards or punishment according to their conduct in this life; it was held that his evidence was admissible.

As to competency of witnesses, see R. S. O. c. 61, ss. 2-11.

As to where affirmation is by law allowed, and forms of affirmation, see R. S. O. c, 61, ss. 12-15.

Not exceeding ten days .- The fine for contempt under this section is not to exceed \$8. It may be imposed by verbal or written order. In addition to the pecuniary penalty, imprisonment may be imposed for a time not exceeding ten days. The amount of the fine after deducting the costs may be made applicable towards indemnifying the party injured by such neglect or refusal.

In the case of In re Pollard, L. R. 2 P.C., 120, it is laid down that, "no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him." At page 325 of Maxwell on Statutes, it is said that, "in giving a judicial power to affect prejudicially the rights of person or property, a statute would be understood as silently implying, when it did not expressly provide the condition or qualification, that the power was to be exercised in accordance with the rule of natural justice, that the person liable to be prejudicially affected should first have an opportunity of defending himself:" see also Thorburn v. Barnes, L. R. 2 C. P. 384; Bullen v. Moodie, 13 C. P. 126, and 2 E. & A. 379; Nicholls v. Cumming, 1 S. C. R. 395. As to order for imposition of fine, and the entry to be made by clerk, see Forms 73

Expenses to be paid witness out of county.

134. Any person served with such subpæna, who is resident in Ontario, but out of the county in which the Division Court is situate, shall be entitled to be paid witness fees and incleage according to the County Court tariff. 49 V. c. 15, s. 10.

Served with such subpoena.—The provisions of this section apply only when the witness has been "served with such subpana." If he were not so served he would not be entitled to witness fees and mileage on the County Court scale. Provision is made by section 138 for the examination, "of a witness, who resides in a remote part of the province, and at a great distance from the place of trial." That, however, is only permissive and does not affect the right of the successful party to tax witness fees against his opponent, whether the attendance was voluntary or compulsory.

A witness resident within the province who attends voluntarily without being subposensed will be entitled to his fees on the Division Court scale uthority of Ormichund nons, 7 Ex.

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ntarily without ssion Court scale only. Service of a subpoena is only necessary to compel attendance, and Sections does not affect the right of the witness to his fees nor the right of the party 134-185 who called him, if successful, and costs allowed, to tax them against his opponent: Fox v. Toronto and Nipissing Ry. Co., 7 P. R. 157.

The same rule applies to a party to the cause,

County Court Tariff.—The allowance to witnesses, according to the Cou

To witnesses residing within three miles of the Court House, per diem	
House	00
Parrietors and solicitors physicians and surgoons other	25
than parties to the cause, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions,	
per diem 4	00
Engineers, surveyors and architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment,	
	00
If witnesses attend in one case only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each case only	
The travelling expenses of witnesses over three miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way	

Commissions to take Evidence.

135. In case the plaintiff or defendant in an action in Power to a Division Court is desirous of having at the trial thereof missions to the testimony of a person residing without the limits of the dence. Province, the Judge of the County Court of the county wherein the action is pending, may, upon the application of the plaintiff or defendant, and upon hearing the parties, order the issue of a commission out of and under the seal of the Division Court to a commissioner to take the examination of such person. R. S. O. 1877, c. 47, s. 99; 52 V. c. 12, s. 13.

Person residing.—As to meaning of the word "residing," see notes to section 81.

Application of such plaintiff or defendant.—The application should be made so soon as some issue is raised which must be tried, if the action be tried at all: Smith v. Greey, 11 P. R. 38. It should be made a reasonable time after defence put in: Brydges v. Fisher, 4 M. & Sc. 458; and if made for the purpose of delay will be refused: Lloyd v. Key, 8 Dowl. 253; Temperance Colonization Socy. v. Evans, 7 C. L. T. 46; or

the defendant may be ordered to pay money into court: Sparks v. Barrett. 5 Scott. 402. Neither party is absolutely entitled to a commission. It is a matter of judicial discretion, and ought only to be granted on reasonable grounds being shewn for its issue. The court must take care, on the one hand, that it is not granted when it would be oppressive or unfair to the opposite party, and, on the other hand, that a party has reasonable facilities for making out his case when, from the circumstances, there is a difficulty in the way of witnesses attending the trial: Coch v. Allcock, 21 Q. B. D. 178. The affidavits should shew what evidence is expected to be obtained from the witness sought to be examined : Smith v. Greey, 10 P. R. 531; (but see Ontario Bank v. Smith, 1 West. L. T. 118: 6 Man. L. R. 60, in which that principle was not approved of), and that such witness is necessary and material, and why he cannot appear at the trial: Kidd v. Perry, 14 P. R. 364; Langen v. Tate, 24 Ch. D. 522; Lawson v. Vacuum Brake Co., 27 Ch. D. 137. It is safer where any injustice to other parties, in the way of delay or expense, or otherwise, can be provided against, to favour the granting rather than the refusing of the application; the main considerations are a full and fair trial and the saving of expense: Robins v. Empire Ptg. Co., 12 C. L. T. 199; 14 P. R. 488. Where a strict cross-examination is necessary, of an interested witness, and it cannot be had according to the law of the country where the commission is to be executed the court will refuse the application: Re Boyse. Crofton v. Croften, 20 Ch. D. 760; but if it is desired to impeach the veracity of a witness by general testimony, this can be done at the trial, and it is no ground for refusing the application: Nordheimer v. McKillop, 10 P. R. 246; and the mere fact that the witness fears cross-examination, is no answer: Carruthers v. Graham, 9 Dowl. 947; but if the witness is interested, and the application is made solely to avoid cross-examination. ination at the trial, the application will be refused: Berdan v. Greenwood, 20 Ch. D. 764 (note); Armour v. Walker, 25 Ch. D. 673. Experts should not be examined on commission: Russell v. G. W. Ry. Co., 3 U. C. L. J. 116; Atty.-Genl. v. Gooderham, 10 P. R. 259; not even of lawyers, as to a question of foreign law unless competent men cannot attend without difficulty, or there will be a saving of expense: The Moxham, 1 P. D.

It need not appear that any effort was made to obtain the attendance of the witness: Norton v. Melbourne, 3 Bing. N. C. 67, or that the defence is true: Westmoreland v. Huggins, 1 Dowl. N. S. 800. It is no conclusive answer that there are witnesses within the jurisdiction who can swear to the same facts: Adams v. Corfield, 28 L. J. Ex. 31. The application under this section should be on notice: Doe v. Pattisson, 3 Dowl. 35. Evidence improperly taken can be rejected at the trial: Lumley v. Gye, 3 E. & B. 114: see Watts v. Anderson, 5 Man. L. R. 291. The time, and place and manner of examination should be fixed: Greville v. Stultz, 11 Q. B. 997; see also Simms v. Henderson, 11 Q. B. 1015; but see Farrel v. Stephens, 17 U. C. R. 250; but will be waived by appearance of opposite party to cross-examine: Howkins v. Baldwin, 16 Q. B. 375; Darling v. Darling, 9 P. R. 560. The order will be made to suit the circumstances of each case: Mills v. Wellbank, 3 Scott N. R. 177. A time is usually fixed in the order for return of commission, but it can be extended: Clinton v. Peabody, 7 M. & G. 399. If first commission proves abortive, a second will be ordered: Fisher v. Izataray, E. B. & E. 321. The order usually contains a stay of proceedings, but only for limited time: Forbes v. Wells, 3 Dowl. 318. Where a single commissioner is appointed the commission should authorize him to administer the oath to himself; Wilson v. DeCoulon, 22 Ch. D. 841. The reception of improper evidence should be objected to on the examination, and if received, the objection should be noted in the notes of witnesses testimony.

Advantage may then be taken of it, but not otherwise: Robinson v. Davies, 5 Q. B. D. 26; see Watts v. Anderson 5 Man. L. R. 291. An order for a commissioner to examine M., and other witnesses does not authorize a commission to examine M. only, without amendment; Smith v. Babcock, 9 P. R. 175. A second commission may issue to examine a witness where he admits he did not fully disclose the facts on the first commission: Rogers v. Manning, 8 P. R. 2. In some cases involving intricate questions of fact, the evidence will be ordered to be taken viva voce: Watson v. McDonald 8 P. R. 354. Where a witness is travelling, it should be shewn that he will remain at the place to which the commission is directed long enough to allow of its due execution: Singer v. Williams Manf. Co., 8 P. R. 483.

A copy of interrogatories should be annexed to the commission.

If the commission not taken out promptly, depositions might not be receivable in evidence: Ponsford v. O'Connor, 5 M. & W. 673; see Watts v. Anderson, 5 Man. L. R. 291.

In framing interrogatories leading questions should not be put, and may be struck out at the trial if objected to by the opposite party: Alcock v. Royal Exchange Ass. Co., 13 Q. B. 292; but not necessarily: Small v. Nairne, 13 Q. B. 840; Lockwood v. Bew, 10 P. R. 655.

If either party wants to use a document in the hands of the opposite party, he must give notice to produce it: Cunliffe v. Whitehead, 3 Dowl. 634; and the examination should, if possible, be conducted upon the same rules as in a trial at Nisi Prius: Ib. A party cannot abandon an interrogatory in part; he must do it in whole: Wheeler v. Atkins, 5 Esp. 246.

"Due notice" of commission must be given (C. R. 589), otherwise depositions would not be received (2 Starkie's Ev. 264), as the opposite party has the right to cross-examine: Ib.; Attorney-General v. Davison. McClel. & Y. 160. The evidence under a commission is receivable, notwithstanding the affidavit of examination is made by the commissioner, and returned under his hand, but not his seal: Beach v. Odell, 4 O. S. 8. The signature and seal of one purporting to be Chief Magistrate, to an affidavit of execution will be presumed genuine: Doe Lemoine v. Raymond, 5 O. S. 337. An affidavit that the examination of the witnesses was duly taken, not that the commission was duly taken in accordance with the literal wording of the statute, is sufficient, and need not be entitled in any cause: McLeod v. Torrance, 3 U. C. R. 146; Doe Park v. Henderson, 7 U. C. R. 182; see also Passmore v. Harris, 4 U. C. R. 344. The affidavit of due taking of commission need not be signed by the deponent: Wilmot v. Wadsworth, 10 U. C. R. 594. When commission will be ordered to be returned when defectively executed as supposed: Doe Hay v. Hunt, 1 P. R. 44. If the affidavit substantially shows commission duly taken, it is sufficient: Bunnel v. Whitlaw, 14 U. C. R. 241. It is no objection that one of the witnesses affirmed: Ib. ot appear that the witness was examined where the mayor resides who takes the affidavit: Stebbins v. Anderson, 20 U. C. R. 239. The envelope containing commission must be under the hand and seal of commissioner, and there must be an affidavit of due taking, otherwise depositions cannot be read: Reford v. McDonald, 14 C. P. 150. The contractions "Plff." and "Deft." in title of affidavit of execution no objection: Frank v. Carson, 15 C. P. 135; nor if entitled in one court instead of another: Comstock v. Burrowes, 13 U. C. R. 439. The affidavit must identify the depositions: Milligan v. G. T. Railway Co., 16 C. P. 191.

If commission taken in Quebec, the affidavit can be taken before a Notary Public there: Beard v. Steele, 34 U. C. R. 43; R. S. O. c. 61, s. 34. When the commission was not returned to the office mentioned in the order, it was held no objection to the evidence: Stevenson v. Rae, 5 C. P.

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406. An opening in the envelope not large enough to let out any of the papers is no objection: Frank v. Carson, 15 C. P. 135. The commission need not be indorsed with the style of the cause, nor need the evidence be annexed to it, and should be so framed as to bind all parties to be examined, and particularly as to the mode of administering the requisite oaths to Jews or others: Ib. A person who acts under a commission, which contained specific directions as to the mode of return, cannot afterwards object that certain formalities prescribed by the statute, but not by the commission, have been omitted: Frank v. Carson, 15 C. P. 135; Heyland v. Scott, 19 C. P. 165. A commission produced at the trial in an envelope open at both ends, but otherwise unobjectionable, was received: Graham v. Stewart, 15 C. P. 169. The affidavit of execution may speak of depositions or examinations. as synonymous terms: Muckle v. Ludlow, 16 C. P. 420. The rigid provisions of the statute commented on: Ib. Entitling defendant's name in the cause in the commission as "William" instead of "ramuel," held fatal, and the taking of evidence a void proceeding: Graham v. Stewart, 15 C. P. 169. Technical objections in Superior Courts held not properly to be taken at the trial, but on application before it: Lodge v. Thompson, 26 U. C. R. 588. Objections to commission, if not taken, are waived: Farrel v. Stephens, 17 U. C. R. 250; Walton v. Apjohn, 5 O. R. 65. Change of the day for the examination held no objection, in Comstock v. Galbraith, 21 U. C. R. 297; Comstock v. Tyrrell, 12 C. P. 173. A contraction in the name of a witness in the return of the commission is no objection: Ib. Where the order was that the witnesses should "sign" the depositions, but the commission contained no such clause, it was held that the depositions were receivable: Hodges v. Cobb, L. R. 2 Q B. 652. The oath of the commissioner may sometimes be dispensed with: Boelen v. Melladew, 10 C. B. 898. Although there are written interrogatories, it is no objection that the commissioner put the questions viva voce: Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 600; but if any interrogatory is not put, the evidence will not be received : Melville-Mut. M. & F. Ins. Co. v. Driscoll, 11 S. C. R. 183. Commissioners have a lien on commissions for their fees: Peters v. Beers, 14 Beav. 101. A barrister has a lien for his fees on commission: Smith v. Hallen, 2 F.

An ex parte order can be obtained to open commission before court. The practice is to open in presence of both parties: Neale v. Withrow, 4 U. C. L. J. 88.

As to affidavit and order for commission, see Schedule of Forms.

Under an order to take evidence on commission the evidence can only be taken on interrogatories unless otherwise ordered, and where undersuch an order the evidence was taken viva voce, it was suppressed: Watts v. Anderson, 5 Man, L. R. 291; Mulligan v. White, 5 Man, L. R. 40.

The order should not be made ex parte: Holmes v. C. P. Ry. Co., 5 Man. L. R. 245.

Objections to the evidence taken on commission are not waived by cross-examining the witness after raising the objection, and subject to it; nor by omitting to object after the commission had been formally returned, upon an application to send it back for a proper return, or upon a further application to extend the time for the return. Waiver, as a general rule, is doing something after an irregularity committed, when the irregularity might have been corrected before such act was done. It might consist, too, of lying by and eliowing the opposite party to take a fresh step in the case: Watts v. Anderson, 5 Man. L. R. 291.

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136. No order shall be made for the issue of such sections commission for the taking of the evidence of the person when comapplying therefor, or any person in his employment, unless missions to in the opinion of the Judge a saving of expense will be dence of caused thereby, or unless it is clearly made to appear that etc., may be granted. the person is aged, infirm, or unable from sickness to appear as a witness. R. S. O. 1877, c. 47, s. 100.

The law relating to taking evidence in Division Court causes does not favour the taking of such evidence of the person applying for the same or of any person in his employment. If, however, in the opinion of the Judge, a saving of expense would be caused by taking such evidence, the commission may be allowed. Should the person applying or some person in his employment be aged, infirm, or unable from sickness to appear as a witness, the commission may also be ordered.

A party applying may, however, obtain an order for a commission to examine a co-plaintiff or co-defendant: Wilson v. McDonald, 13 P. R. 6.

The fact that the party applying is afraid to return to Ontario on account of criminal proceedings, though a good reason for a commission in the higher courts, is no ground for the issue of a commission from a Division Court: Mills v. Mills, 12 P. R. 473.

137. In case it be made to appear to the Judge that Examinaa material and necessary witness residing within the witnesses whose at-Province is sick, aged, or infirm, or that he is about to leave tendance at trial the Province, and that his attendance at Court as a witness cannot be obtained, cannot by reason thereof be procured, the Judge may make an order appointing a suitable person to take the evidence of the said person. A copy of the order, with two days' notice of the time, and place of the examination shall be served upon the opposite party, his solicitor or agent, who may appear, and cross-examine the witness. The evidence shall be taken on oath, and shall be reduced to writing, and signed by the witnesses, and shall be transmitted to the clerk of the Court, and shall be by him kept on file, and may be used upon the trial saving all just exceptions. The costs of the order shall be in the discretion of the Judge, and the reasonable charge of the examiner (to be fixed by the Judge) shall, in the first instance be paid by the party obtaining the order, as in the case of witness fees, and shall thereafter be paid as the Judge may order. 49 V. c. 15, s. 18.

Attendance at Court cannot be procured.—In order to found an application under this section the following circumstances must concur:
(1) That the person proposed to be examined is a material and necessary witness residing within the Province; (2) That such person is either (a) sick, (b) aged, (c) infirm, or (d) is about to leave the Province; (3) That in consequence of the existence of one or more of these facts the attendance at court of such witness cannot be procured.

A material witness is one whose evidence is pertinent to the question to be tried and of importance to the person calling him.

A necessary witness is one whose evidence is so important that it would not be prudent or safe for a party to proceed to trial without it.

As a rule the application should not be granted until defendant has put in his defence: Smith v. Greey, 10 P. R. 531, and other cases cited in notes to section 135 p. 195.

The application should not as a rule be ex parte: McKenna v. Everett, 2 Beav. 188; Anderson v. Anderson, 1 Ch. Cham. R. 291; Hope v. Hope, 3 Beav. 317, 323; Early v. McGill, 1 Ch. Cham. R. 100, 257; Bidder v. Bridges, 26 Ch. D. 1; Thomas v. Storey, 11 P. R. 417.

But where the witness is dangerously ill, or over 70 years of age, the High Court of Justice has generally granted the order ex parte: see Bellamy v. Jones, 8 Ves. 31; McKenna v. Everitt, 2 Beav. 188; Oliver v. Dickey, 2 Ch. Cham. R. 87; Crippen v. Ogilvy, 2 Ch. Cham. R. 304; Bidder v. Bridges, 26 Ch. D. 1, per Selborne, L.C., at p. 9.

But the fact that the witness is about to leave the Province, and there is danger that his evidence may be lost unless promptly obtained, is no ground for granting the order ex parte: Holmes v. C. P. Ry, Co., 8 C. L. T. 261; 5 Man. L. R. 346.

The evidence of the witness should not, however, be taken ex parte: Warner v. Mosses, 16 Ch. D. 100; and the examination of a witness conducted by one party without notice to his opponent is irregular and inadmissible as evidence: Stephenson v. Dallas, 13 P. R. 450. Where the proposed evidence would be inadmissible no purpose would be served in granting the order, and it would probably be refused: Fisher v. Berrell, 1 Dowl. N. S. 565; or would not support any issue to be tried: Jones v. Tobin, 4 Bing. N. C. 123; Speeding v. Young, 16 C. B. N. S. 824; Galloway v. Keyworth, 15 C. B. 228.

There is no provision made for the examination of parties to the action on their own motion but it is submitted that an order should be made in a proper case on motion by the party himself: see section 136; Moffatt v. Prentice, 9 L. J. N. S. 159; Fisken v. Chamberlin, 9 P. R. 283; Fischer v. Hahn, 13 C. B. N. S. 659; Castelli v. Groom, 18 Q. B 490; and such examination might certainly be compelled by the opposite party or a co-defendant.

Where a motion is made by the party himself for his own examination the court must be thoroughly satisfied of the bona fides of the application, and that it is not made for the purpose of avoiding cross-examination: Berdan v. Greenwood, 20 Ch. D. 764; Langen v. Tate, 24 Ch. D. 522; Kidd v. Perry, 14 P. R. 364; Light v. Anticosti, 58 L. T. N. S. 25; Thomas v. Storey, 11 P. R. 417.

The application should be made within a reasonable time after notice of defence: Brydges v. Fisher, 4 M. & Sc. 458, and other cases cited in notes to section 135, p. 195.

The names of the witnesses sought to be examined should be stated in the affidavit: Gunther v. M'Tear, 1 M. & W. 201; Norton v. Lord Melbourne, 3 Bing. N. C. 67.

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The order must state the names of the witnesses to be examined: Section Warner v. Mosses, 16 Ch. D. 108.

Sometimes it may be necessary to state upon what facts it is proposed to examine the witness: see Barry v. Barclay, 15 C. B. N. S. 819; see notes to section 135.

In an action under Lord Campbell's Act, an order was made for the examination before trial, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of deceased. It was provided that the examination should not be used at the trial, unless the plaintiff was unable to procure the attendance of the witness: Elliott v. C. P. Ry. Co., 12 P. R. 593.

No provision is made as to the evidence by which the applic again is to be supported. An affidavit by a person having knowledge of the facts would be sufficient. If a solicitor were employed, he or his managing clerk would ordinarily be able to make the necessary affidavit: McHardy v. Hitchcock, 17 L. J. Ch. 256; Elmsley v. Cosgrave, 6 P. R. 164; Lloyd v. Henderson, 6 P. R. 254; Baker v. Jackson, 10 P. R. 624.

Where an application was made on the ground that the parties concerned all lived abroad, and that the surviving witness to be examined was greatly afflicted with gravel, the order was made, although the affidavit only stated the witness was upwards of 60 years old: Fitzhugh v. Lee, Ambl. 65.

The Court of Chancery always allowed the examination de bene esse of a witness about to go abroad: Bown v. Child, 3 Sim. 457; McIntosh v. G. W. Ry. Co., 1 Hare, 328; McKenna v. Everitt, 2 Beav. 188; Grove v. Young, 3 DeG. & S. 397; see also Warner v. Mosses, 16 Ch. D. 100.

But if it is in the power of the party applying to detain the witnesses till they have been examined in the ordinary course, the order will not be made: East India Co. v. Naish, Bunb. 320.

It is doubtful whether the fact that a witness is in a state of pregnancy, or about to be delivered of a child, is a cause for granting the order: see R. v. Wellings, 3 Q. B. D. 426. At all events, in applications founded on pregnancy of the witness, an affidavit of a competent person should be produced shewing that the delivery would probably happen about the time fixed for the trial, or so near as to render the attendance of the witness perilous; Abraham v. Newton, 8 Bing. 274; see also R. v. Inhabitants of Huddersville, 7 E. & B. 794.

An order may be granted where a witness is so unwell that there is no probability of his being able to attend the trial: Pond v. Dimes, 3 M. & Sc. 161; Bellamy v. Jones, 8 Ves. 31; Jephson v. Greenaway, 2 Fowl.

The affidavit of a medical man should generally be produced in such cases: Davis v. Lowndes, 7 Dowl. 101: Duke of Beaufort v. Crawshay, L. R. 1 C. P. 699; or else his certificat.. or opinion should be verified by affidavit; but the affidavit of the solicitor of his information and belief, with grounds thereof, was held sufficient: Baker v. Jackson, 10 P. R. 624.

It is not necessary, generally, for the defendant to swear to merits when the application is made on his part, nor that it is not made for the purposes of delay: Baddeley v. Gilmour, 1 M. & W. 55.

Disobedience to the order could be punished by attachment: see section 73: Martin v. Bannister, 4 Q. B. D. 491; Richards v. Cullerne, 7 Q. B. D. 623.

There is no provision for the production of books, papers and documents on such examination.

The examiner has no discretion as to the materiality of the questions put, unless upon matters which would clearly and palpably not be evidence: Surr v. Walmsley, L. R. 2 Eq. 439; but he should note any question objected to: Richardson v. Davies, 5 Q. B. D. 26.

In Wright v. Wilkin, 4 Jur. N. S. 804, it was said that the court would not delegate to the examiner the power of treating a witness as hostile so as to authorize the examination to be conducted in the nature of a cross-examination by the party calling him, but Lord Cairns, L.C., in Ohlsen v. Terrero, L. R. 10 Ch. 129, strongly disapproved of this ruling and pointed out that if a witness or his counsel thought that he was being unfairly dealt with he might refuse to answer a particular question, and upon that refusal the matter might be brought before the court, who would decide whether the examiner was pursuing a proper course or not in allowing a witness to be treated as hostile: as to hostile witnesses, see Rice v. Howard, 16 Q. B. D. 681; Buckley v. Cooke, 1 K. & J. 29; notes to section 131, ante p. 191.

The depositions must be signed by the witness or they will not be received in evidence except by consent.

The examiner's room is not a public court and he must exclude other persons than those entitled to be there if requested by either party: In reWestern of Canada Oil Lands, etc., Co., 6 Ch. D. 109; see Rich v. Stark, 8 C. L. T. 191; Hands v. Upper Canada Furniture Co., 12 P. R. 292.

The statute requires two days' notice of the time and place of examination to be served upon the opposite party. If the notice were not given and the opposite party did not attend on the examination the evidence would be rejected; Steinkeller v. Newton, 9 C. & P. 313. But it is not necessary that he should exercise the power of cross-examining the witness; all that is required is that he shall have the opportunity of doing so: Cazerove v. Vaughar, 1 M. & S. 4; and his right to take part in the examination might possibly be waived by giving notice that he would not do so: McCombie v. Anton, 6 M. & G. 27.

The depositions could not be received as evidence in a suit between other parties: Doe v. Derby, 1 A. & E. 783, 786.

All just exceptions to the admission of the depositions are reserved to the opposite party. On this point and on the subject of examinations generally, see notes to section 135. The depositions may be used at the trial.

The fact that the Judge has made the order directing the evidence to be taken by an examiner is sufficient to enable the party obtaining the order to put the depositions in evidence, saving all just exceptions; Ryan v. Devereux. 26 U. C. R. 100.

If the examination is not used no costs of it should be allowed McMillan v. McMillan, 8 L. J. N. S. 285; Curling v. Robertson, 7 M. & G. 525; Ridley v. Sutton, 1 H. & C. 741; Dominion, etc., Co. v. Stinson, 9 P. R. 177. But where a witness was so old and infirm that it was prudent to take his examination, but he was afterwards able to attend the trial, the plaintiff was allowed both the costs of the examination and of his attendance at the trial, and the expenses of the journey of the son of the witness and his attendance upon him in giving evidence, in consequence of the age and infirmity of the witness, were also allowed: Duke of Beaufort v. Earl of Ashburnham, 13 C. B. N. S. 598.

Unless some special ground appears for ordering otherwise the costs of the examination will usually be made costs in the cause: Prince v. Samo, 4 Dowl, 5; McMillan, v. McMillan, 8 L. J. N. S. 285.

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The evidence is to be taken under oath. Power is given by section 138, s-s 2, to administer the oath. This includes affirmations and declarations; see R. S. O. c. 61. ss. 12, 15, notes to sections 111, s-s. 3, and to section 135. If no objection is made before the examiner it might have the effect of waving the right afterwards to object to the admissibility of the objectionable part at the trial; Robinson v. Davies, 5 Q. B. D. 26; see also Cutler v. Wright, W. N. (1890), 28; A mere irregularity in taking the deposition would be the subject of special application to the Judge to have it suppressed, but it would not be an objection to its admissibility at the trial: Grill v. Iron Screw Collier Co., L. R. 1 C. P. 600.

The evidence must be taken on oath, reduced to writing, signed by the witness, transmitted to the clerk of the court, and by him kept on file ready to be produced when required. To render it evidence it should he produced from the proper custody and purport to be duly taken: Reford v. McDonald, 14 C. P. 150. The production by the clerk would not, however, be necessary to its reception; if otherwise correct the evidence would, it is submitted, be receivable.

It would seem that the evidence could be taken if material, whether there were other witnesses to testify to the same fact or not. The writer

submits that the rule laid down in that respect in Jameson v. Jones, 3 Ch. Cham. 98, does not apply to this section.

A special examiner or officer of court taking an examination in a cause or proceeding pending in court has no power to authorize any other person to take down the depositions in shorthand; and a person cannot be compelled, in the face of his objection, to submit himself for examination when the examiner proposes to have the depositions so taken: Bradt v. Bradt, 9 C. L. T. 472.

Where the interests of a witness might be affected by the examination, it was held that he was entitled to have counsel present, upon the examination to protect his interests: Dominion Bank v. Bell, 13 P. R.

138. (1) An order may also be obtained for the exami-Examination of a witness who resides in a remote part of the witness at Province, and at a great distance from the place of trial, if a distance it be clearly made to appear that his attendance cannot be of trial. procured, or that the expense of his attendance would be out of proportion to the amount involved in the action, or would be so great that the party desiring his attendance should not, under the circumstances, be required to incur the same; and the proceedings thereon, and the order as to costs, shall be the same as in the case of an order in the next preceding section mentioned.

(2) The person appointed under this and the next preceding section shall have authority to administer an oath to the person to be examined. 49 V. c. 15, s. 19.

Remote part of the Province.—The words "in a remote part of the Province" are of relative import. No definite meaning can be given to them. They must be construed in relation to the circumstances of the

Sections 138-139

case. Mere distance alone would not govern. Worcester defines "remote" "distant in place, time or connection: far; far off; not near; not nigh." The residence of a witness, under this section, may be considered as "remote" from the place of trial although the actual distance may not be great.

The season of the year at which the court is to be held, the accessibility to the place of trial, the facilities of travel by rail or steamboat, the expense which the witnesses would be put to the time of his absence from home, the convenience of travel to and from the place of trial, would all come within the definition of the word "remote" as "distant in time, place or connection." The same may be said of the expression, "great distance from the place of trial." It is an expression which must be construed relatively. Like "gross" negligence, it is simply "remoteness" after all: see Wilson v. Brett, 11 M. & W. 113; Beal v. South Power Processing the place of trial. Devon Ry. Co, 3 H. & C. 337; Grill v. General Iron Screw Co., L. R. 1 C. P., p, 612.

The affidavit must show "clearly" why the witness cannot be procured or what the expense of his attendance would be, so that the Judge may infer that it would be out of proportion to the amount involved in the action or would be so great as to be practically prohibitive.

The evidence must be taken and returned, and may be used in the same manner as under section 137.

Rules made applicable

139.—The provisions of the Rules of the Supreme to commis. Court of Judicature, so far as the same are applicable, shall apply to every commission issued under the authority of this Act. R. S. O. 1877, c. 47, s. 101.

Rules of the Supreme Court of Judicature,

589. Due notice of every such commission shall be given to the adverse party, to the end that he may cause the witnesses to be crossexamined. R. S. O. 1887, c. 62, s. 22.

591. Upon an application for a commission to take evidence the applicant is in the notice of motion to state the name of the commissioner to whom he desires the commission to be issued; and where the opposite party desires to name another commissioner, he is, on the return of the motion, to give notice to the applicant of the name of any other commissioner. J. A. Rule 286.

592. Upon the hearing of the motion the Court or Judge (or officer before whom the motion is made) may order the issue of the commission directed to the persons so named or to such other person or persons as may seem proper. J. A. Rule 287.

Rules 591 and 592 are strictly not applicable to the Division Courts, under the above section, but the practice thereunder will be found con-

593. The order or certificate for the issue of a commission is to state the name of the commissioner to whom it is to be directed, and whether the examination of witnesses thereunder is to be taken upon oral questions or upon written interrogatories, and also whether or not notice of the execution thereof is to be given to the opposite party; and in case notice is to be so given, then the name and the address of the person on whom such notice is to be served are to be stated in the order. J. A. Rule 288.

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594. The examination of witnesses under a commission is to be taken either orally or upon written interrogatories, or partly in one way and partly in the other, as the court or a Judge may direct. All oral questions shall be reduced into writing and with the answers thereto returned with the commission. See J. A. Rule 289.

595. Where the examination is to take place upon written interrogatories, the interrogatories in chief are to be delivered to the opposite party (unless otherwise ordered) at least 8 days before the issue of the commission; and the cross-interrogatories are to be delivered to the opposite party (unless otherwise ordered) within 4 days after the receipt of the interrogatories in chief; and in default of cross-interrogatories being so delivered, the opposite party may send the commission without cross-interrogatories. J. A. Rule 290.

596. An examination may be executed ex parte, unless the opposite party shall, upon the hearing of the application for the order or Master's certificate for the issue of the commission, require notice of the execution of the commission, and give the name and place of abode of some person resident within two miles of the place where the commission is to be executed, upon whom notice may be served. J. A. Rule 291.

597. Where notice of the execution of the commission is required to be served, 48 hours' notice shall be sufficient; such notice is to be in writing, stating the time and place of the intended examination, and is to be addressed to the person named for that purpose in the order or certificate for the issue of the commission; and service upon him, or upon a grown up person, at the address stated in the order or Master's certificate, shall be sufficient. If the name or address stated in such order or certificate shall prove to be illusory or fictitious, or if the party so notified fails to attend, pursuant to the notice, the commission may be executed ex parte. J. A. Rule 292.

598. In the event of any witness on his examination, cross-examination or re-examination, producing any book, document, letter, paper or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extract, shall be annexed to the witness' deposition. J. A. Rule 293.

599. Every witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion, by or before the said commissioners or commissioner. J. A. Rule 294.

600. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and viva voce questions, as the case may be, being previously translated into the language with which, he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto. J. A. Rule 295.

601. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions. J. A. Rule 296.

602. The interrogatories, cross-interrogatories, and depositions together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Judge or officer on or before

Section 139 Sections 139-141

such day as may be ordered in that behalf, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence, on the trial of the action, by and on behalf of the said parties respectively, saving all just exceptions, without any other proof of the absence, from this country, of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the party as to his belief of such absence. J. A. Rule 297.

603. Where, upon the application for a commission to take evidence, the opposite party desires to join in the commission and examine witnesses on his own behalf thereunder, or names a commissioner, each party is to pay the cost of the commission consequent upon the examination of his witnesses and the appointment of his commissioner, without prejudice to the question by whom such costs are ultimately to be borne; and if for any reason the commissioner named by either party refuses to act in the execution of the commission upon receiving 48 hours notice in writing from the other of them so to do, the commission may be executed by the commissioner giving such notice alone. J. A. Rule 298.

604. Every order for a commission shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions, which the court or Judge shall see fit to make. J. A. Rule 300.

Return of commissions. 140. [The Commission, with the evidence taken thereunder, and the papers therewith shall forthwith be returned to the Clerk of the Division Court in which the action to which the same relates is pending.] 52 V. c. 12, s. 14.

The 140th section of the Consolidated Division Court Act, 1888, (R S.O. c. 51), has been repealed and the above substituted therefor.

Formerly the commission was returned to the clerk of the County Court, and transmitted by him to the clerk of the Division Court in which the action was pending.

Costs of Commission. 141. [The costs of the issue, transmission, execution and return of any such commission shall be in the discretion of the Judge of the Court in which the action is pending who may allow a sum in gross therefor], and the costs may be added to any other costs to be paid to the party entitled thereto, and may be recovered by the party entitled thereto in like manner as the ordinary costs of the action are recoverable by the practice of the Division Courts. R. S. O. 1877, c. 47, s. 103; 52 V. c. 12, s. 15.

Formerly costs were taxed on the County Court scale, but now the amount, or the method of arriving at them, is in the discretion of the Judge. Such discretion must be exercised judiciously: see notes to section 8; Stroud, 216.

THE UNIVERSITY LAW SIBRARY

Books of Account, Affidavits, etc., as evidence.

Sections 142-143

142. In an action for a debt or demand, not being for Judge may tort, and not exceeding \$20, the Judge, on being satisfied of evidence their general correctness, may receive the plaintiff's books of account. So far as the same extends to \$20, may receive the defendance books as evidence, and the Judge may also receive as evidence the affidavit or affirmation of any party or witness in the action resident without the limits of his county, but, before pronouncing judgment, the Judge may require such witness or any party in a cause to answer upon oath or affirmation any interrogatories that may be filed in the action. R. S. O. 1877, c. 47, s. 104.

Debt on demand .-- See notes to section 109.

Not exceeding \$20.—The Judge must first be satisfied of the "general correctness" of the books; and if he is, it is then permissible to receive them. The defendants books are only receivable in evidence in the defences of set-off or payment. The experience of most Judges is that the evidence of well kept books, in which the original entries have been made in regular order, is of the most reliable and satisfactory character. In other cases than those provided for in the section, books of account may be used to refresh memory: Taylor on Evi. 1198-1206; or as entries made by a deceased person against his pecuniary or proprietory interest: Higham v. Ridgway, 3 Sm. L. C. Edson ed. 1607; Taylor on Evi. 558; or in the usual course of business and made contemporaneously with the acts to which they relate: Price v. Torrington, 1 Sm. L. C. Edson ed. 566; Taylor on Evi. 612-624; or in actions between master and servant, tradesman and shopman, banker and customer or copartners when the opposite party has had ample opportunities from time to time for testing the accuracy of the entries: Taylor on Evi. 704.

Affidavit or Affirmation.—To save expense this provision has been introduced. The witness must be "resident" without the county in which the suit is to be tried. As to what constitutes "residence," see notes to sections 81, 82, 99.

Any interrogatories, etc.—The right of cross-examination is here recognized: Attorney-General v. Davison, McClel. and Y. 160. It is submitted that the affidavit or affirmation of a person resident out of the Province could be received.

143. All affidavits to be used in Division Courts or Affidavits before any of the Judges thereof, may be sworn before a sworn before a County Judge or before the Clerk or Deputy Clerk of a Judge, Division Court, or before a Judge, Notary Public or Commissioner for taking affidavits in the High Court. R. S. O. 1877, c. 47, s. 105; 48 V. c. 16, s. 1.

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Sections 143-144 All affidavits.—As to affidavits generally, see Rule 133 and notes to section 110.

The heading of an affidavit is merely descriptive and not an allegation of fact: Hood v. Cronkite 4 P. R. 279; Re Creen, 15 L. J. N. S. 35.

The name of the court and style of cause should appear in an affidavit, Rule 133: Allman v. Kensel, 3 P. R. 110; Swift v. Jones, 6 U. C. L. J. 63; Hart v. Ruttan, 23 C. P. 613; In re Sharpe, 2 Ch. Cham. 67; McDonald v. Cleland, 6 P. R. 289; Scott v. Mitchell, 8 P. R. 518. The Judge could, however, receive the affidavit notwithstanding these defects: Rule 133.

The description of the residence of a deponent in an affidavit must be that residence which exists at the time of the swearing of the affidavit; Button v. O'Neill, 4 C. P. D. 354.

High Court.—This section expresses the different persons who only have the right to take affidavits in the Division Courts. All affidavits taken by persons other than those mentioned in this section would be void.

JUDGE'S DECISION.

Clerk etc. Judge may give judgment instanter, or postpone judgment.

144. The Judge, in any case heard before him shall, openly in court and as soon as may be after the hearing, pronounce his decision; but if he is not prepared to pronounce a decision instanter, he may postpone judgment and name a subsequent day and hour for the delivery thereof in writing at the clerk's office; and the clerk shall then read the decision to the parties or their agents, if present, and he shall forthwith enter the judgment, and such judgment shall be as effectual as if rendered in court at the trial. R. S. O. 1887, c. 47, s. 106.

Pronounce his decision.—" Decision" here means the judicial disposal of the case which the Judge has heard. The Legislature has evidently taken the same view as Jessel, M.R., did,—"that a Judge's decision is best when the facts are fresh in his mind"—by declaring that he should pronounce a decision in a case tried before him instanter. By section 70 this is to be done in a summary way "agreeable to equity and good conscience."

A Judge cannot alter his decision at will: Jones v. Jones, 5 D. & L. 628; Irving v. Askew, L. R. 5 Q. B. 208, but he may do so before he enters it: Canadian Land & Emigration Co. v. Dysart, 9 O. R. 495, 512.

Name a subsequent hour.—This should be carefully observed, otherwise the Judge might frequently be subject to a motion for prohibition: Re Burrowes, 18 C. P. 493; Re Tipling v. Cole, 21 O. R. 276; Forbes v. Michigan Cent. Ry. Co., 12 C. L. T. 485; Re Wilson v. Hutton, Q. B. Divl. Ct., 24th Dec. 1892; but unless the party complaining is prejudiced by the delivery of the judgment without notice, prohibition will be refused: Re McPherson v. McPhee, 21 O. R. 280, 411; and if the parties assent to the Judge delivering judgment when ready to do so, they cannot afterwards have prohibition: Bank of Ottawa v. Wade, 21 O. R. 486.

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Interest.—The allowance or disallowance of interest is frequently a matter for consideration at the trial, The following enactments bear on the question: Interest shall be payable in all cases in which it is now payable by law, or in which it has been customary for a jury to allow it: R. S. O. c. 44, s. 85. This section was originally 7 Wm. IV. c. 3, s. 20. The concluding clause is not in the English Statute, 3 and 4 Wm. IV. c. 42. At common law interest was not payable on ordinary debts unless by agreement or mercantile usage; nor could damages be given for nonpayment of such debts: Higgins v. Sargent, 2 B. & C. 348; Page v. Newman, 9 B. & C. 378; Foster v. Weston, 6 Bing. 709; but an implied contract to pay interest may be raised from the dealings between the parties, as where the debtor has been in the habit of paying interest upon such or similar securities: $Ex\ parte\ Williams,\ 1\ Rose,\ 399$; Newell v. Jones, 4 C. & P. 124; and a partner could not be charged interest on an overdrawn account; Rhodes v. Rhodes, Johns. 653; 6 Jur. N. S. 600; see Rishton v. Grissell, L. R. 10 Eq. 393; but a surety could charge interest on a sum he had been compelled to pay: Petre v. Duncombe, 2 L. M. & P. 107; 15 Jur. 86; Wellington County v. Wilmot Township, 17 U. C. R. 82; Hitchman v. Stewart, 3 Drew. 271; Ex parte Bishop, 15 Ch D. 400; and so might an agent who had advanced money for his principal in mercantile business: Bruce v. Hunter, 3 Camp. 467; and where, but for the breach of his agreement, the defendant would have become liable for a debt bearing interest in an action for such breach, interest may be awarded; Rhoades v. Selsey, 2 Beav. 359; McIntosh v. G. W. Ry. Co., 4 Giff. 696; s. c. 2 Mac. & G. 74; Lond. Chat. & Dover Ry. Co. v. S. E. Ry. Co., (1892), 1 Ch. 120; Marshall v. Poole, 13 East, 101; Farr v. Ward, 3 M. & W. 25. Money due on an account stated will not bear interest except payable on a particular day or by usage shewn in the account: Nichol v. Thompson, 1 Camp. 52 (n); Pinhorn v. Tulkington, 3 Camp. 468; Challe v. York, 6 Esp. 45; or the account stated is for money lent, or between merchant and merchant; Blaney v. Hendricks, 2 W. Bl. 761; or the action is upon an award of a sum payable at a certain time; Towsley v. Wythes, 16 U. C. R. 139; Churcher v. Stringer, 2 B. & Ad. 777; or is for money improperly retained by a sheriff; Michie v. Reynolds, 24 U. C. R. 303; or improperly used in his business by an agent: Landman v. Crooles, 4 Gr. 353; but where, though an agent's accounts were found to be inaccurate, there was no fradulent dealing with the money, nor any wilful withholding of accounts or fraudulent falsification of them, interest was disallowed: Turner v. Burkinshaw, L. R. 2 Ch. 488; Re Kirkpatrick. Kirkpatrick v. Stevenson, 10 P. R. 4.

In practice interest is much more frequently allowed by our juries than English authority would seem to warrant. In this case the court struck the interest out of the verdict: Spence v. Hector, 24 U. C. R. 277.

On the trial of any issue, or any assessment of damages upon any debt or sum certain payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable: R. S. O. c. 44, s. 86, s.s. 1. The contract must ascertain the sum and the time: the certainty of both must appear from the contract, but if all the elements of certainty appear by the contract, and nothing more is required than a mathematical computation to ascertain the exact sum or the exact time for payment, that will be sufficient: Merchant Shipping Co. v. Armitage, L. R. 9, Q. B. 99; Lond. Chat. & Dover Ry. Co. v. S. E. Ry. Co., (1892), 1 Ch. 120, 144, 148. The case of Duncombe v. Brighton Club & Norfolk Hotel Co., L. R. 10 Q. B. 371, must be treated as not good law. A mere application for a loan till a fixed day but containing no obligation to repay, is insufficient, though the loan is made on the terms of the application: Taylor v. Holt, 3 H. & C. 452. The allowance of the interest is discretionary: Hill v. South

Staffordshire Ry. Co., L. R. 18 Eq. 170. The statute is not applicable to cases where a recovery is sought, not against a defendant personally, but against his estate; and except under extraordinary circumstances, upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity: Snarr v. Badenach, 10-O. R. 131.

If payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing informing the debtor that interest will be claimed from the date of the demand; R. S. O. c. 44, 8, 86, 8-8. 2.

Demand held sufficient, see Mowatt v. Londesborough, 4 E. & B. 1; Mildmay v. Methuen, 3 Drew. 91; Ex parte Lintott, L. R. 4 Eq. 184; Edwards v. G. W. Ry. Co., 11 C. B. 588; Re Overend, Gurney & Co., Barron's case, L. R. 3 Ch. 784. A claim of interest on the summons is an insufficient demand: Rhymney Ry. Co. v. Rhmney Iron Co., 25 Q. B. D. 146.

The demand must be in writing: Inglis v. Wellington Hotel Co., 29 C. P. 387. A solicitor may give notice that he will claim interest on his bill of costs delivered to his client from the date of the notice: Berrington v. Phillips 1 M. & W. 48; Re McClive, 9 P. R. 213.

In actions for conversion of goods or for trespass de bonis asportatis, the jury may give interest in the nature of damages, over and above the value of the goods at the time of the conversion or seizure; and in actions on policies of insurance, may give interest over and above the amount recoverable thereon: R. S. O. c. 44, s. 87.

Interest need not be claimed nor special damage laid: Paine v. Pritchard, 2 C. & P. 558. On a policy of insurance interest can only be allowed for the wrongful detention of money which ought to have been paid; and when, for want of administration, there was no person clothed with a legal title to the money, interest was disallowed: Webster v. British Empire, Mut. Life Ass. Co., 15 Ch. D. 169; Toronto Savings Bank v. Canada Life Ass. Co., 14 Gr. 509.

Compound interest is never allowable except by express or implied contract: Fergusson v. Fyffe, 8 Cl. & F. 121; Atwood v. Taylor, 1 M. & G. 279; Daniel v. Sinclair, 6 App. Cas. 181.

Where a bill is dishonored, the holder may recover from any party on the bill, and the drawer may recover from the acceptor, and the indorser who has been compelled to pay may recover from the acceptor, or from the drawer or from a prior indorser, interest from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case: Bills of Exchange Act, 1890, 53 Vic. c. 35, s. 57, s.s. 2; see London Universal Bank v. Clancarty, (1892), 1 Q. B. 689; Lawrence v. Willcocks, (1892), 1 Q. B. 696.

At what rate.—Where interest is recoverable by virtue of a contract, the rate fixed by the contract will be recoverable, or if no rate is fixed, then at six per cent. But where there is no express contract to pay interest after the principal money becomes due, interest will be allowed only as damages and will be limited to six per cent: R. S. C. c. 127, s. 2; Dalby v. Humphrey, 37 U. C. R. 514; St. John v. Rykert, 10 S. C. R. 278; Powell v. Peck, 12 O. R. 492; 15 A. R. 138; Grant v. Peoples Loan and Deposit Co., 17 A. R. 85; 18 S. C. R. 262; see Freehold L. & S. Co. v. McLean, 2 West. L. T. 143.

Where a contract is to pay principal money and interest, and a judgment is recovered thereon, the contract is merged in the judgment, and interest can only be recovered on the judgment; and the rate will be six per cent: Florence v. Drayson, 1 C. B. N. S. 584; McKay v. Fee, 20

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U. C. R. 268; Re European Central Ry. Co., 4 Ch. D. 33; see section 230 infra; but where there is a separate covenant to pay interest so long as the principal shall remain due, judgment may be recovered from time to time for the difference between the interest at the rate specified in the contract and the rate paid under the judgment: Popple v. Sylvester, 22 Ch. D. 98.

Sentions 144-145

Where an excessive rate is paid after maturity the excess cannot be recovered back or applied in reduction of the principal: Hutton v. Federal Bank, 9 P. R. 568.

A verdict which would entitle a party to judgment if not moved against, bears interest from the time it is rendered if judgment is afterwards entered in favor of the party who obtained it: R. S. O. c. 44, s. 88; McLaren v. Canada Central Ry. Co., 10 P. R. 328.

A bank cannot stipulate for, take, reserve, recover or exact more than 7 per cent., but may receive such rate in advance: 53 V. c. 31, s. 80. Other corporations, companies or association of persons, unless otherwise authorized, are limited to six per cent. on loans of moneys, wares, merchandize or other commodities, but certain insurance companies and any corporation constituted for religious, charitable or educational purposes authorized by law to lend or borrow money, may allow or exact up to 8 per cent: R. S. C. c. 127, s. 10; see as to Loan Companies, R. S. C. c. 119, s. 96; R. S. O. c. 169, s. 66; 55 V. c. 40, s. 1.

Where payments are made and not specially appropriated to the principal, they may be applied first in reduction of the interest: Mc-Gregor v. Gaulin, 4 U. C. R. 378; Bettes v. Farewell, 15 C. P. 450; Ross v. Perrault, 13 Gr. 206; Barnum v. Turnbull, 13 U. C. R. 277; Cummings v. Usher, 1 P. R. 15.

In England a County Court judgment does not bear interest: R. v. Judge of Essex Co. Ct., 18 Q. B. D. 704; but a Division Court judgment probably bears interest under section 7, but certainly if execution is resorted to for collection of a judgment, interest may be levied under section 230.

145. The Judge may order the time or times and the Judge may proportions in which any sum and costs recovered by judg-times and proportions in which any sum and costs recovered by judg-times and proportions in which any sum and costs recovered by judg-times and proportions in which day on which the summons was served. [But unless other-judgment wise ordered no execution shall issue on any such judgment paid. within fifteen days after the entering of such judgment.] and at the request of the party entitled thereto, he may order the same to be paid into court, and the Judge, upon the application of either party, within fourteen days after the trial, and upon good grounds being shewn, may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings. R. S. O. 1877, c. 47, s. 107; 52 V. c. 12, s. 16.

May order the time or times .- If made at the time of judgment this: order forms part of it: Robinson v. Gell, 12 C. B. 191; Ely v. Moule, 5 Ex. 918.

Upon the application of either party.—Application must be made according to Rule 142 (see also Rule 144); and care should be taken in observing all the requirements of that rule: see also McKenzie v. Keene, 5 U. C. L. J. 225. As to new trial in interpleader cases, see section 269.

Within fifteen days.—This is an amendment to the Consolidated Act by 52 V. c. 12, s. 16. Unless otherwise ordered by the Judge, execution cannot now be issued within fifteen days after the entering of the judgment. See section 45.

"Within fifteen days" means clear days; that is, exclusive of the day of entering judgment and of the day of issuing the execution thereon; Radcliffe v. Bartholomew, (1892), 1 Q. B. 161.

After the trial.—See last preceding note. Execution cannot issue under this section within 15 days "after the entering of such judgment," but the application for a new trial must be made within fourteen days after the trial.

New Trial.—Should the trial take place on the 1st of the month, the application should be complete on the 15th of the same month. It is now settled that a new trial cannot be granted after the expiration of fourteen days from the day of trial: Mitchell v. Mulholland, 14 L. J. N. S. 55: see also Bell v. Lamont, 7 P. R. 307; Re Foley v. Moran, 11 P. R. 316; see Soules v. Little, 12 P. R. 533; Bland v. Rivers, 19 O. R. 407; except in garnishee matters; McLean v. McLeod, 5 P. R. 467; or where the Judge postpones judgment under section 144, then within 14 days of its delivery: Rule 142. But a Judge may set aside a judgment for irregularity at any time: Stewart v. Moore, 9 U. C. L. J. 82; Bayly v. Borne, 1 Str. 392; Jewell v. Hill, 1 Str. 499. But a stranger cannot apply, even though an execution creditor: Nicholls v. Nicholls, 10 U. C. L. J. 68; Molsons Bank v. McMeekin, 15 A. R. 535; unless on the ground of fraud and collusion: see Balfour v. Ellison, 8 U. C. L. J. 330; McGee v. Baird, 8 U. C. L. J. 233; Klein v. Klein, 7 U. C. L. J. 296; Gridlestone v. Brighton Aquarium Co., 3 Ex. D. 137; s. c. 4 Ex. D. 107. Where a Judge has decided an application for a new trial and refused to grant it, his authority is not at an end; he may afterwards grant it on fresh material: Moxon v. London Tramways Co., 60 L. T. N. S. 248; see G. N. Ry. Co. v. Mossop, 17 C. B. 139; Coke v. Jones, 4 L. T. N. S. 306.

The Judge may dispense with notice of motion, and grant the order ex parte: In re Backhouse v. Bright, 13 P. R. 117, and cases there cited.

It is only necessary that the application should be made to give the Judge jurisdiction. The fact that a rule of the Division Court requiring an affidavit had not been compiled with, was no objection to the exercise of jurisdiction: Fee v. McIlhargey, 9 P. R. 329.

Application for a new trial is not a waiver of defendant's right to object to the jurisdiction: In re Evans v. Sutton, 8 P. R. 367.

A plaintiff who has taken a non-suit rather than go to the jury on an unfavorable charge, cannot obtain a new trial: McGrath v. Cox, 3 U. C. R. 382; nor if he has taken a non-suit during the charge: Fraser v. North Oxford & West Zorra Plank Road Co., 15 U. C. R. 291.

The withdrawal of a juror does not put an end to the cause. If there has been a breach of the terms on which the juror was withdrawn, the court may re-try the action: Thomas v. Exeter, etc., Co., 18 Q. B. D. 822; and so if the Judge has decided that he has no jurisdiction, but afterwards concludes that his decision was erroneous, he may grant a new trial: Lister v. Wood, 23 Q. B. D. 229; and a new trial may be granted where a plaintiff has taken a non-suit in deference to a Judge's ruling: Burn v. Belcher, 14 C. P. 415; Hatton v. Fish, 8 U. C. R. 177.

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Upon good grounds.—What are good grounds is a question for the Judge; and if he grants a new trial his decision will not be reviewed on prohibition, even where he finds misconduct of the jury, without any evidence to warrant it; Moxon v. London Tramways Co., 60 L. T. N. S. 248. But in appealable cases his finding might be set aside, and the Judge should not in an unappealable case grant a new trial upon other grounds than would be sufficient if his finding were subject to appeal. A new trial should never be granted except upon grounds which would be sufficient in the High Court: Murtagh v. Barry, 24 Q. B. D. 632; i.e., that some miscarriage of justice would ensue, unless granted: Jenkins v. Morris. 14 Ch. D. 684; Grieve v. Molsons Bank, 8 O. R. 162.

The following are the grounds for granting a new trial:

- 1. Improper admission or rejection of evidence.
- 2. Improper non-suiting of plaintiff.
- 3. Misdirection, or non-direction of the jury.
- 4. Perverse verdict or verdict against the weight of evidence.
- 5. Verdict too small or too great.
- 6. Surprise and discovery of new evidence: Arch. Pr. 13th ed. 1210.

The Judge, of course, also has power to grant a new trial upon the ground that his judgment was wrong, either in law, or fact upon the evidence before him.

At common law upon any improper admission or rejection of evidence, or any misdirection, in point of law, of the jury, a new trial was granted, but the modern rule in the High Court is that a new trial should not be granted on these grounds, unless some substantial wrong or miscarriage has taken place: C. R. 791. This principle of practice may be adopted by the Judge of the Division Court: see section 304 infra.

A new trial for the improper admission of evidence would not be granted unless objected to at the trial: Campbell v. Beamish, 8 U. C. R. 526, and if it could be shewn that there was sufficient evidence to support the verdict independently of the evidence improperly admitted a new trial would be refused: Appleton v. Lepper, 20 C. P. 138; Dundas v. Johnson, 24 U. C. R. 547; Cooley v. Smith, 40 U. C. R. 543; but if the Judge commented to a jury on the inadmissible evidence as important, a new trial should be granted: Bank of Hamilton v. Isaacs, 16 O. R. 450.

Misdirection can only be in point of law, not on a matter of fact; and the objection to the charge either for misdirection or for non-direction must be taken at the trial: R. v. Fick, 16 C. P. 379; Taylor v. Ashton, 11 M. & W. 401. A Judge may tell the jury his own opinion: Dougherty v. Williams, 32 U. C. R. 215; Smith v. Dart, 14 Q. B. D. 105.

Non-direction is only a ground for new trial when the verdict is against the weight of evidence: G. W. Ry. Co. v. Braid, 1 Moo. P. C. N. S. 101; 9 Jur. N. S. 339.

Where a non-suit is set aside in a case tried by a jury, the defendant is entitled to a new trial for the purpose of calling evidence; but where the action is tried by a Judge, he is not so entitled, and the Judge may enter judgment under section 146 for the plaintiff: Macdonald v. Worthington, 7 A. R. 531. A non-suit granted without the plaintiff's consent, on the opening speech of counsel, will be set aside: Fletcher v. L. and N. W. Ry. Co., (1892), 1 Q. B. 122.

Where there is evidence upon which the jury might reasonably find the verdict, a new trial will not be granted: Webster v. Friedeberg, 17 Q. B. D. 736; Metrop. Ry. Co. v. Wright, 11 App. Cas. 152; Commissioners of Railways v. Brown, 13 App. Cas. 133; see Grieve v. Molsons. Bank, 8 O. R. 162; Malcolmson v. Hamilton, P. & L. Socy., 10 A. R. 610; Heintzman v. Graham, 15 O. R. 137.

Where the damages awarded are excessive, the court may reduce them with the consent of the plaintiff alone without granting a new trial; Belt v. Lawes, 12 Q. B. D. 356; Massie v. Toronto Ptg. Co., 11 O. R.

Where the jury have, manifestly, not considered all the elements of damage, a new trial will be granted: Phillips v. L. & S. W. Ry. Co., 5 Q. B. D. 78. A new trial will not be granted merely to adduce corroborative evidence: Miller v. Confederation Life Ass. Co., 14 A. R. 218; Merchants Bank v. Lucas, 13 O. R. 520; McDermott v. Ireson, 38 U. C. R. 1.

If new evidence is discovered, it must be material, and nearly or quite conclusive, and that it could not have been produced at the former trial: Synod v. De Blaquiere, 10 P. R. 11; Anderson v. Titmas, 36 L. T. N. S. 711; Rowe v. G. T. R. Ry. Co., 16 C. P. 500; Downey v. Patterson, 38 U. C. R. 513.

The witness himself should show on affidavit what facts he can prove: Robinson v. Rapelje, 4 U. C. R. 289; White v. Brown, 12 U. C. R. 477; Bates v. Chisholm, 7 C. P. 46; Longueuil v. Cushman, 24 U. C. R. 602.

Surprise may be a ground for new trial, but the party applying must have adopted all reasonable and proper precautions for properly presenting and proving his case. It may consist in the absence of solicitor, counsel or witnesses, or on the ground of testimony being contrary to expectation, or of false or mistaken evidence: see Kitchen v. Murray, 16 C. P. 69; Martin v. Corbett, 7 U. C. R. 169; Livingstone v. Gartshore, 23 U. C. R. 166; Chadd v. Meagher, 24 C. P. 54.

There should be an affidavit shewing a good cause of action or defence on the merits which can be sustained on a new trial: Moore v. Hicks, 6 U. C. R. 27; Moore v. Gurney, 22 U. C. R. 209. It is usually made a condition that the costs of the former trial and of the motion be first paid. Where the action is of a penal character, the court will not grant the plaintiff a new trial except on account of a mistake or misdirection of the Judge: Stinson v. Scollick, 2 O. S. 217; Root v. Woodward, 1 U. C. R. 311: or that the verdict is in contravention of law: Atty.-Gen. v. Rogers, 11 M. & W. 670. The court will rarely grant a new trial where an issue charging a party with a criminal offence is found in his favour: Gould v. British Am. Ass. Co., 27 U. C. R. 473; but see McMillan v. Gore Dist. M. F. Ins. Co., 21 C. P. 123.

Where the jury answered all the questions submitted by the Judge, but their findings were insufficient to justify a verdict for either party, a new trial was ordered, each party to bear his own costs of appeal and new trial: Fradenburgh v. Haskins, 12 A. R. 257; see also St. Denis v. Baxter, 13 O. R. 41; 15 A. R. 387.

Judgment in applicaappeals.

146. Upon an application for a new trial the Judge, tions for new trials, instead of granting a new trial, may pronounce the judgment which in his opinion ought to have been pronounced at the trial, and may order judgment to be entered accordingly. 47 V. c. 10, s. 10 (4).

> Formerly any mistaken view of the law or fact, by the Judge, could only be remedied by the granting of a new trial: Pryor v. City Offices Co., 10 Q. B. D. 504. Under this section, however, the Judge has power to proncunce the judgment which, in his opinion ought to have been

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pronounced at the trial, and to order that judgment be entered accord- Sections ingly. This cannot, it is submitted, be done if the case be tried by a jury, except by directing a non-suit upon the ground that there was no evidence to submit to the jury: McConnell v. Wilkins, 13 A. R. 438; Allcock v. Hall, (1891), 1 Q. B. 444. If the Judge has power to disregard the verdict of the jury and find a verdict himself, that power should be most cautiously and sparingly exercised: Stewart v. Rounds, 7 A. R. 515, and should not, it is submitted, be used to find a verdict for the plaintiff or assess his damages, unless the facts are all uncontradicted and there is nothing to do, therefore, but direct the jury to bring in a particular verdict: see Toulmin v. Millar, 12 App. Cas. 746; Yorkshire Banking Co. v. Beatson, 5 C. P. D. 109; Mellisch v. Lloyds, 46 L. J. C. P. 404; Perkins v. Dangerfield, 51 L. T. N. S. 535; Garland v. Thompson,

147. Except in cases where a new trial is granted, the Execution not to be issue of execution shall not be postponed for more than fifty postponed for more days from service of the summons without the consent of than 50 days. the party entitled to the same, but in case it at any time appears to the satisfaction of the Judge, by affidavit, affirmation or otherwise, that a defendant is unable, from sickness or other sufficient cause, to pay and discharge the the debt or damages recovered against him, or any instalment thereof, ordered to be paid as aforesaid, the Judge may suspend or stay any judgment, order or execution given, made or issued in the action, for such time and on such terms as he thinks fit, and so from time to time until it appears by the like proof that the temporary cause of disability has ceased. R. S. O. 1877, c. 47, s. 108.

New trial.—See notes to section 145.

9 O. R. 376.

Not more than fifty days. - This excludes the day of service: Young v. Higgon, 6 M. & W. 49; McCrae v. Waterloo M. F. Ins. Co., 26 C. P. 437; S. C. 1 A. R. 218. In fixing the time of payment the date of the service of the summons should always be observed. Unless consented to, the Judge has no power to postpone the execution more than fifty days from the service of the summons.

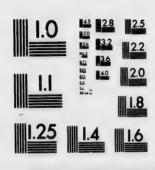
Execution may be amended so as to make it conform to the judgment: Glass v. Cameron, 9 O. R. 712.

Affidavit or affirmation.—See notes to sections 86, 111, 143; Rules

Or otherwise. - See note to section 110, ante p. 151.

Other sufficient cause.—The power given to the Judge under this section is extensive and unusual, and should be sparingly and cautiously used: 8 U. C. L. J. 264. "The Judge may suspend or stay execution, implying the exercise of judgment, not arbitrary discretion, but judicial discretion, in view of all the facts. We have no hesitation in saying that the practice of granting ex parte suspensions is a monstrous perversion of the true meaning of the clause, and a gross violation of the vital principle of justice:" 9 U. C. L. J. 177.

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STATE OF THE STATE



Sections 147-148 Execution can only be suspended or stayed for one or more of the causes mentioned in the section. It was held that the court could not restrain a plaintiff from levying his debt out of any one of several defendants he pleased: Zavitz v. Hoover, M. T. 2 Vic.; nor will the plaintiff becompelled to proceed against the goods of several defendants in succession first exhausting one, and then levying upon the goods of another: Com. Bank v. Vankoughnet, 1 Cham. R. 260.

The court or Judge has not the power to delay a plaintiff's proceedings on an execution to enable defendants to institute an action, and to acquire a position in which they may apply to set-off the judgment to be recovered by them against plaintiff's judgment: Lynch v. Wilson, 9 U. C. L. J. 242, per Draper, C.J.; see also Freeland v. Brown, 9 U. C. L. J. 299; Maw v. Ulyatt, 7 Jur. N. S. 1300; s. c. 5 L. T. N. S. 251; Johnson v. Lakeman, 2 Dowl. 646; Thompson v. Parish, 6 C. B. N. S. 685.

It is difficult to give a meaning to the words "or other sufficient cause." "When general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis," per Tenterden, C.J., Sandiman v. Breach, 7 B. & C. 99; Kitchen v. Shaw, 6 A. & E. 729, per Denman, C.J. It is submitted that these words are ejusdem generis with the word "sickness" preceding them: i.e., some cause which would produce a temporary disability in the same manner as would sickness.

In acting under this section the plaintiff should have notice of the application, and a copy of the affidavit on which it is grounded served upon him, and should be called upon to shew cause against granting a stay in the execution: 8 U.C.L.J. 264; see 6 U.C.L.J. 205; see also notes to section 86 aute, p. 119, 120.

But if the plaintiff should be present no summons to shew cause would be necessary: Baird v. Story, 23 U. C. R. 624; Watt v. Ligertwod, 2. Scotch App. 367, n.

APPEALS.

Appeal.

148. (1) In case a party to a cause [or any of the parties to garnishee proceedings under this Act], wherein the sum in dispute upon the appeal exceeds \$100 exclusive of costs, is dissatisfied with the decison of the Judge, upon an application for a new trial, he may appeal to the Court of Appeal, and in such case the proceedings in and about the appeal, and the giving and perfecting of the security, shall be the same as on an appeal from the County Court, except where otherwise provided by this Act, and the terms. "party to a cause" and "appellant" in this section and hereafter used, shall have the meaning attached thereto in and by section 40 of The County Courts Act [and shall include any party to garnishee proceedings and any party added by order of the Judge]. 43 V. c. 8, s. 17; 51 V. c. 10, s. 2.

Rev. Stat. c. 47.

(2) An appeal shall also lie to the Court of Appeal from the decision of a Division Court Judge upon an

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application for a new trial in all actions in which the Section parties consent to an appeal, and in interpleader, where $\frac{1}{\text{Appeal in}}$ the money claimed, or the value of the goods or chattels Interclaimed or of the proceeds thereof, exceeds \$100, or where proceedthe damages claimed by or awarded to either party against the other or against the bailiff, exceed the sum of \$60. 47 V. c. 10, s. 9; 48 V. c. 14, s. 7.

Any party to a cause.—Section 40 of the County Courts Act (R. S. O. c. 47) defines "party to a cause" and "appellant," to include "persons suing or being sued in the name of others, though not mentioned in the record, and persons on whose behalf or for whose benefit any action is prosecuted or defended, as well as parties named in the record." The phrase would, therefore, include an assignee suing in the name of his assignor and a person who had indemnified a defendant, and was defending the action brought against the party indemnified.

Ordinarily parties to a cause are merely the original parties in an action: Beswick v. Boffey, 9 Ex. 315; Mason v. Wirral Highway Board, 4 Q. B. D. 459. A next friend is not a party to a cause: Sinclair v. Sinclair, 13 M. & W. 640; Dyke v. Stephens, 30 Ch. D. 189; Taylor v. Wood, 12 C. L. T. 195, nor is a guardian ad litem: Ingram v. Little, 11 Q. B. D. 251.

A garnishee is not a party to a cause. The garnishee proceedings are grafted upon the cause, and are merely attached thereto: Cameron v. Allen, 10 P. R. 192.

Under the Judicature Act "party" includes every person served with a notice of or attending any proceeding although not named in the record: R. S. O. c. 44, s. 2; see Fraser v. Burrows, 2 Q. B. D. 624; Burstall v. Fearon, 31 W. R. 581.

If a third party should, under order of a Division Court, have authority to defend the action, it is submitted, he would be a party to the cause as interpreted by section 40 of the County Courts Act: see McAllister v. Bishop of Rochester, 5 C. P. D. 194; Piller v. Roberts, 21 Ch. D. 198; Eden v. Weardale Iron & Coal Co., 34 Ch. D. 223; 35 Ch. D. 287.

New Trial.—An appeal lies from either the granting or refusal of a new trial: Pole v. Bright, 8 T. L. R. 69; (1892), 1 Q. B. 603.

Garnishee proceedings.—An appeal was first allowed by a garnishee by 51 Vic. c. 10: see Cameron v. Allen, 10 P. R. 192.

Mutual Insurance Appeals.—52 V. c. 31, s. 3, provides: "Where in any Division Court suit or proceeding a decision is rendered which in effect, or in terms, declares invalid any general assessment made by a mutual insurance company, such decision shall be appealable notwithstanding the sum in dispute upon the appeal is less than \$100, and all the provisions contained in sections 148 to 153, both inclusive, of the Division Courts Act shall apply to such appeal."

This provision merely enables the company to carry a suit to an appeal as a test case. It frequently happens, however, that an assessment attacked as invalid by a large number of policy holders is held good by a Division Court Judge, and there is no power to appeal therefrom unless the judgment against one of the defendants exceeds \$100. It would be useful to allow an appeal by leave, where a number of actions. involve the same question, so as to make the rights of parties equal.

Section 148 Sum in dispute.—This is the sum for which judgment has been given. The fact that such sum, with interest subsequently accrued, exceeds \$100, will not give a right of appeal: Foster v. Emory, 14 P. R. 1.

General principles of appeal.—An appeal does not lie in any case unless given by statutory enactment: R. v. Cashiobury (Jus.), 3 D. & R. 35; R. v. Hanson, 4 B. & Ald. 521; R. v. Stock, 8 A. & E. 405; R. v. Recorder of Ipswich, 8 Dowl. 103.

The creation of a new right of appeal requires legislative authority: Atty.-General v. Sıllem, 10 L. T. N. S. 434; and where that right is so conferred, it is, in the absence of any other statutory provision, the only one that can be taken: Thomas v. Hilmer, 4 U. C. R. at p. 528, per Robinson C.J.; Pattypiece v. Mayville, 21 C. P. 316; In re Newton, 8 Jur. N. S. 495.

An Appellate Court does not reverse the decision of a court below it, simply because it might on the facts have come to a different conclusion. The Appellate Court sees that the inferior court is clearly wrong before reversing its decision: Keena v. O'Hara, 16 C. P. at p. 438, per Richards C.J.; The Picton, 4 S. C. R. 648; Ryan v. Ryan, 5 S. C. R. 406; Grassett v. Carter, 10 S. C. R. 107; Prentice v. Consolidated Bank, 13 A. R. 69; Symmington v. Symmington, L. R. 2 Sc. App. 424; Berdan v. Greenwood, 20 Ch. D. 769.

The provisions of the English County Court Act are different from those of this Act. Under the English Act, an appeal cannot be taken except on questions of law, or the improper admission or rejection of evidence, and for that purpose the Act of 1888, section 121, superadds the requirement that the Judge shall take a note of any questions of law raised at such trial or hearing, and of the facts in evidence in relation thereto and of his decision thereon, and of his decision in the action or matter. His decision upon the facts cannot be reviewed: Cousins v. Lombard Bank, 1 Ex. D. 404.

And any point of law intended to be ruled upon must be raised in the inferior court: Rhodes v. Liverpool Com. Inv. Co., 4 C. P. D. 425; Clarkson v. Musgrave, 9 Q. B. D. 386; Smith v. Baker, (1891), A. C. 325.

Under our statute, the Judge of the Appellate Court has the right to review the decision of the Division Court on questions of fact as well as of law.

Statutes relating to Appeals.—The Act relating to appeals from the County Court is made the basis of appeal under this statute, so that reference to it will be necessary for a proper understanding of the appeal clauses of this Act. The statute made specially applicable to this section is R. S. O. c. 47, of which section 40 is given above. The other sections of that Act which may be considered in connection with this are sections 43, 48 and 49, and are as follows:

"43. An appeal may be had from any appealable decision of a County Court Judge, notwithstanding judgment has been signed thereon: provided that the required security be given within the time limited by the Judge under section 46; and in every case the allowance of the bond by the Judge shall operate as a stay of execution, unless the Judge shall otherwise direct."

"48. In case of security being given by bond, the parties executing the same shall justify to the amount of the penalty of the bond by affidavit annexed thereto, in like manner as bail are required to justify."

"49. The bond and affidavit of justification, and an affidavit of the due execution of the bond, shall be produced to the Judge, to be approved of by him; and upon being approved of shall be filed in the office of the court appealed from until the opinion of the Court of Appeal has been given, and shall then be delivered to the successful party."

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When an Appeal lies .- As previously remarked, the Court of Appeal Section has under this section a power of review, not only over the law, but the facts of any case brought before it. "The defendant, supposing him to be unsuccessful in the Division Court, is better off than he would be in the High Court of Justice, for he can promptly and with but little expense, crave the highest opinion in the province by having recourse to the Court of of Appeal as provided by the statute," per Falconbridge, J., In re Gegg v. Adams, 9 C. L. T. 311; S. C. 10 C. L. T. 2.

There is no appeal direct from the Judge's decision on the trial of a cause, but only after he has decided "an application for a new trial."

It is submitted that no appeal will successfully lie against the reasonable exercise of the discretion of the Judge: Goodes v. Cluff, 13 Q. B. D. 694; Virtue v. Hayes, 9 C. L. T. 207; Nelson v. Thorner, 11 A. R. 616. In Manning v. Ashall, 23 U. C. R. 302, the appeal was against the granting of a new trial because "the verdict was against evidence, or at all events against the greater preponderance of evidence." Draper, C.J., in delivering the judgment of the court says: "The decision involved no point of the law, strictly speaking, and certainly does not decide the questions which were argued before us. We think we should not give effect to an appeal from a decision of the Judge of a County Court on a point like this which is so truly an exercise of discretion by one who, having presided at the trial, and seen and heard the witnesses, is in a much more favorable position to decide correctly than this court can be." See also Williams v. Jones, 34 Ch. D. 120; Bazett v. Morgan, 24 Q. B. D. 48; Platt v. G. T. Rv. Co., 12 P. R. 380; Jones v. Tuck, 11 S. C. R. 197; R. v. Richardson, 8 O. R. 651; Eureka Woollen Co. v. Moss, 11 S. C. R. 91; but see R. v. Meyer, 11 P. R. 477.

At the trial the plaintiff elected to take a non-suit and the Judge refused a new trial; it was held that the case was appealable: Bank of Ottawa v. McLaughlin, 8 A. R. 543.

Formerly an appeal did not lie on an interpleader issue; but provision is now made for an appeal in such cases by sub-section (2) of this section: see note to sub-section 2.

The parties cannot waive a motion for a new trial and go direct to the Court of Appeal: McColl v. Waddell, 19 C. P. 213.

The appeal given here would not apply to orders for committal under section 240; Rackham v. Blowers, 15 Jur. 758.

"Either party" has a right to appeal (in any case the subject of appeal) against the decision of a Judge, on an application for a new trial: see section 150; Foster v. Green, 6 H. & N. 793.

A purely technical objection to a party's right of action, which had not been made in the court below, and could have been met by evidence, would not, it is submitted, be entertained in appeal; Bank of Bengal v. Fagan, 7 Moo. P. C. 61; Kay v. Marshall, 8 C. & F. 245; Midland Banking Co. v. Chambers, L. R. 4 Ch. at. p. 400, per Selwyn, L.J.; Macdougall v. Knight, 14 App. Cas. 194; nor a point as to which it is not clear beyond doubt that the facts, if fully investigated, will support it: Connecticut Mutual Fire Ins. Co. v. Kavanagh, (1892), A. C. 473; Flatt v. Waddell, 18 O. R. 539; but a substantial question, upon the construction of the document, or upon facts either admitted or proved beyond controversy, though not raised at the trial or on the motion for new trial must be entertained on appeal: Gray v. Richford, 2 S. C. R. 431; but if the appeal is allowed on a point not raised below; the appellant may be disallowed costs: Garrett v. Roberts, 10 A. R. 650.

Where the evidence shews a total absence of foundation for the conclusion at which the Judge has arrived, his decision will be reversed on

Section appeal: British Industry L. Ass. Co. v. Ward, 17 C. B. 644; McLeod v. Chetwynd, 10 C. L. T. 345.

> An order need not be formally drawn up on the application for a new trial before appealing: In re Jones, 4 P. R. 317.

> An appeal would not, it is submitted, be entertained, not on the ground. of the merits of the party's case, but upon a mere formal defect in procedure on the part of the opposite party: Kennington, Ex parte, 8 Jur. N. S. 1111.

> A question of practice would not be appealable: R. v. Stubbs, 1 Jur. N. S. 1115.

> Should a Judge be ready to deliver judgment, but formally delay it. until a certain day in order to facilitate an appeal, judgment delivered on the day to which postponement made would be the formal delivering of it; Rathbone v. Munn, 18 L. T. N, S. 856; In re Burrowes, 18 C. P. 493; Re Smart and O'Reilly, 7 P. R. 364.

> But a Judge cannot by post-dating his judgment extend the time for appealing: Wilberforce v. Sowton, 39 L. T. N. S. 474; see Brown v. Shaw, 1 Ex. D. 425; Hemming v. Blanton, 42 L. J. C. P. 158; 21 W. R. 636; Richardson v. Silvester, 29 L. T. N. S. 395; Barker v. Palmer, 8 Q. B. D. 9.

> Parties will be bound by the case made by the papers, certified by the clerk, and will not be allowed to travel out of it: Watson v. Ambergate, etc. Ry. Co., 15 Jur. 448; Williams v. Evans, L. R. 19 Eq. 547; Rhodesv. Liverpool Com. Inv. Co., 4 C. P. D. p. 427, per Coleridge, C.J.

> The respondent will be equally bound by what appears in the certified proceedings, even though not correct; but probably the Judge in appeal would, if any inaccuracy were shewn to him, either refuse to hear the appeal: Yorke v. Smith, 21 L. J. Q. B. 53, or send it back for correction; Thornwell v. Wigner, L. R. 6 Ex. 87, where the "result of the evidence" only was returned to the Court of Appeal. Lee also Sullivan v. Francis, 18 A. R. 121; Mahon v. Inkster, 6 Man. L. R. 253.

> The death of a respondent would not deprive the appellant of his right. of appeal: Hemming v. Williams; L. R. 6 C. P. 480; but possibly the suit might have to be revived: Rules 155-158.

> If a case is referred to arbitration there is no appeal: Mayer v.. Farmer, 3 Ex. D. 235; nor would the consent of parties make any difference: McColl v. Waddell, 19 C. P. 213.

> Where a judgment is obtained by fraud, appeal is not the remedy: Flower v. Lloyd, 6 Ch. D. 297; 10 Ch. D. 327.

> Upon an appeal from the decision of a County Court in England, in an action for dilapidations, the case, without saying what the evidence given was, stated that the Judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises with the particulars in their hands, and therefore would be able to judge whether and to what extent the plaintiff had made out his case. The court directed a new trial: Smith v. Douglas, 16 C. B. 31.

> The right of appeal is not lost because the Judge omits to take down the evidence on the trial: Sullivan v. Francis, 18 A. R. 121; Bank of Montreal v. Statten, 1 C. L. T. 66.

> A Judge is bound to do all that is legally required of him to facilitate an appeal: Irving v. Askew, L. R. 5 Q. B. 208, and probably an application to compel him to do so would be appealable: Clarke v. Roche, 36-L. T. N. S. 727; Crush v. Turner, 3 Ex. D. 303. Where a Judge dies.

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As to mandamus on refusal to supply Judge's notes, see R. v. Sheffield Co. Ct. Judge, 5 T. L. R. 303.

It was held that there was no appeal against a judgment entered by a County Court Judge pro forma in order to expedite an appeal: Chapman v. Withers, W. N. (1887), 235.

No appeal will lie from an order of a Judge directing the clerk to sign judgment, which, without such order, he should have signed: Barr v. Clark, 8 C. L. T. 30; 5 Man. L. R. 130.

Consent to an appeal.—It is somewhat difficult to believe that the legislature intended to give the right to appeal in all cases, no matter how little was involved; but there appears to be no escape from that conclusion on the wording of the section. When the parties consent to an appeal, the Judge is bound to take down the evidence in writing: section 115 is made applicable to such cases: section 155, s-s. 2.

When there are notes of evidence taken by the Judge in existence, they must be certified to the court: Lumb v. Teal, 22 Q. B. D. 675 at рр. 678, 680.

Quære---Whether an appeal lies by consent in garnishee proceedings. The section does not declare that the consent need be in writing, and in the absence of such provision, a written consent would be unnecessary: R. v Salop (Jus.), 4 B. & Ald. 626; R. v. Surrey (Jus.), 5 B. & Ald. 539; R. v. Huntingdonshire (Jus.), 19 L. J. M. C. 127; R. v Lincolnshire (Jus.), 3 B. & C. 548; R. v. Nicol, 40 U. C. R. 76; Ex parte Butters. in re Harrison, 14 Ch. D. 265.

It would, however, be advisable in all cases that a formal written consent should accompany the papers to the Court of Appeal, see notes to section 91. For form of consent see Forms.

Appeal in Interpleader Proceedings.—The words of this section providing for an appeal in interpleader are very similar to those of the English County Courts Act, 1888, (51 & 52 V. c. 43, s. 120).

The proceedings in interpleader, being merely collateral, no right of appeal existed under the statute of 1880, which first gave an appeal: Re Turner v. Imp. Bank of Canada, 9 P. R. 19; Bank of Montreal v. Statten, 1 C. L. T. 66.

The bailiff should not return, but on the contrary should retain his execution in the original action until the disposal of the appeal: Angell v. Braddeley, 3 Ex. D. 49.

Money claimed.—The appeal is given where the money claimed, or the value of the goods, or the proceeds thereof exceeds \$100; or where the damages claimed or awarded, under section 269, against either party or the bailiff exceed \$60. The value of the goods and the amount of damages cannot be added together so as to make an appealable case. The value of the goods may be \$100 and the damages \$60, and yet there will be no appeal: White v. Milne, W. N. (1887), 256; 58 L. T. 225; Lumb v. Teal, 22 Q. B. D. 675.

It is submitted that no appeal lies even by consent in interpleader proceedings, unless the requirements of the statute as to value or amount are complied with; such proceedings not being an action: see Collis v. Lewis, 20 Q. B. D. 202; Coulson v. Spiers, 9 P. R. 491; Hambyn v. Betteley, 6 Q. B. D. 68.

It is by no means clear that section 115 applies to interpleader: per Osler, J.A., Sullivan v. Francis, 18 A. R. 122; but see section 155, s-s. 2, which makes that section applicable.

Sections 148-149 The statute makes no provision for appraisement of goods seized on execution, as it does in attachment cases, under the 251st. section, and the question is, who is to determine the value of the goods? Is it the bailiff who makes the seizure, or the Judge who tries the interpleader issue? The "value" is not upon the goods that may be seized or otherwise taken by the bailiff, but only on those concerning which the interpleader proceedings are to be had.

Where among the papers returned was a lot of goods bought by the claimant at an auction sale, it was assumed by the appellate court that the figures opposite to each article represented the price: Sullivan v. Francis; 18 A. R. 121.

Proceeds of goods.—There can only be an interpleader in the Division Court for the proceeds of goods, where the claim is made to such proceeds, and if a claim is laid to the goods seized, there could not, without the consent of parties be an issue in respect of the proceeds of them: Reid v. McDonald, 26 C. P. 147.

It is submitted that the words "proceeds" as here used, would mean the gross amount received by the bailiff on sale of goods. Wharton defines the meaning of the word to be "the sum, amount or value of goods, etc., sold or converted into money." See Jones v. Parcell, 11 Q.B.D. 430.

Money paid by the claimant under protest to obtain possession of his goods, would be proceeds thereof within the meaning of the section: Smith v. Critchfield, 14 Q. B. D. 873.

It was doubted whether, in interpleader proceedings, an appeal would lie from a decision of a Judge in the Division Court on the question of damages: Fox v. Symington, 13 A. R. 296; but this sub-section now makes provision for appeal in such cases.

Gross-Appeal.—The respondent may, without any notice, ask for more than his judgment gives him by way of cross-appeal: Hutson v. Valliers, 19 A. R. 154. If the appellant may then abandon the appeal, he would, nevertheless, on the respondent proceeding with his cross-appeal, be entitled to urge his original contentions: The Beeswing, 10 P. D. 18.

Stay of proceedings.

- 149. A Judge of the County Court for the county in which the cause was tried, on the application of the person proposing to appeal, his counsel, solicitor or agent, shall stay the proceedings in the cause, for a time not exceeding ten days from the day of giving judgment on the application for a new trial, in order to afford the party time to give the security required to enable him to appeal. 43 V. c. 8, s. 18.
- (1) [Which security to be given by or on behalf of the appellant, shall be either by a bond to the respondent executed by two persons whether named as sureties or as parties interested or otherwise in the sum of \$100 or such smaller sum as the Judge may direct, conditioned that the appellant shall abide by the decision of the cause by the Court

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f the apexecuteds parties n smaller e appelne Court of Appeal, and pay all sums of money and costs, as well of section the action as of the appeal, awarded and taxed to the opposite party; or by paying into the court appealed from in the manner provided by law, within the time herein limited for the perfecting of an appeal bond, the sum of \$50 or such smaller sum as the Judge may direct.]

(2) [In case security is given by deposit of a sum of money in court, such sum shall remain in court as security for the payment of all sums of money and costs, as well of the action as of the appeal, awarded and taxed to the opposite party.] 53 V. c. 19, ss. 1, 2.

Stay of proceedings.-While the sections relating to appeal do not provide any particular time within which either the security may be given or the appeal brought on, it would appear from two of them that the security must be given within 10 days from the giving of the judgment upon the application for new trial. Section 43 of the County Courts Act and the concluding words of sub-section 1 of section 149, are the only statutory provisions indicating that security must be given within the time during which the Judge may stay proceedings. If this be the correct construction of the various sections a Judge may entirely prevent an appeal by limiting the time for giving security, and his order would not be appealable. But in Boyd v. Brander, 14 P. R. 281, it was held that the time for perfecting the security was not restricted to the 10 days during which the Judge was authorized to stay proceedings. This was followed in Simpson v. Chase, 14 P. R. 280.

If the giving of the security within the time limited be not a condition precedent to an appeal, then how long may the security be delayed? It would appear that the appeal must, at all events, be brought on not later than the first sittings of the Court of Appeal which commence after the expiration of 30 days from the decision complained of: U. R. 836. For time of sittings of Court of Appeal, see C. R. 208.

If the giving of the security within the time limited be a condition precedent the Judge would not have any power to enlarge the time, and unless the security be perfected, at the latest, at the expiration of 10 days from the judgment, no appeal can be entertained: Barker v. Palmer, 8 Q. B. D. 9; R. v. Court of Revision of Cornwall, 25 U. C. R. 286.

If the delay should be the fault of the court, the appeal would probably be heard: see Francis v. Dowdeswell, L. R. 9 C. P. 432, per Brett, J.

Upon the question whether the giving of security within the limited time is a condition precedent, see Stone v. Dean, E. B. & E. 504; Waterton v. Baker, L. R. 3 Q. B. 173; Park Gate Iron Co. v. Coates, L. R. 5 C. P. 634; Re Ronald v. Brussels, 9 P. R. 232.

The application for stay of proceedings should be made by or on behalf "of the person proposing to appeal:" section 148. For form of order staying proceedings, see Forms.

The order would be ex parte: Ex parte Kempson. re Barker, 12 L. T. N. S. 43.

The Judge could not extend the time by allowing his judgment to be post-dated: Wilberforce v. Sowton, 39 L. T. N. S. 474; and cases cited in notes to section 148.

Bection 149 The day on which judgment is given will not be computed as one of the 10 days during which proceedings may be stayed.

If the last day should be a holiday, the security may be given the following day; R. S. O. c. 1, s. 8, s.s. 17.

Security.—If there are two parties appealing, their bond will be sufficient, if approved by the Judge. Ordinarily, however, the Judge will require at least one surety. The Judge may direct that a bond be in a smaller penal sum than \$100. For form of bond see Forms.

The sureties must justify to the amount of the penalty: R. S. O. c. 47, s. 48. For form of affidavit of justification see Forms.

Parties may waive the giving of security within any particular time, or probably may dispense with the giving of it altogether: In re Sharpe, 20 C. P. 82; Park Gate Iron Co. v. Coates, L. R. 5 C. P. 634; Ward v. Raw, L. R. 15 Eq. 83.

The appellant could, within the ten days' stay of proceedings, if he found his first bond defective, withdraw or abandon it and put in another: Daniels v. Charsley, 11 C. B. 739; Norton v. N. W. Ry. Co., 11 Ch. D. 118; see also Blenkairne v. Statter, 31 L. T. N. S, 413.

Approval of security.—Notice of application to the Judge for the approval of the bond, should be given to the opposite party. For form see Forms.

No particular length of notice would be necessary—only reasonable notice.

A practicing solicitor is, perhaps, not a proper surety: see C. R. 1074; Beckitt v. Wragg, 1 Ch. Cham. 5; G. T. Ry. Co. v. Ontario & Q. Ry. Co., 3 C. L. T. 173.

The condition in the bond should strictly comply with the requirements of the statute: Norris v. Carrington, 16 C. B. N. S. 10.

Where money is paid into court instead of a bond, a written memorandum setting forth the conditions on which the money is deposited is unnecessary: Griffin v. Coleman, 4 H. & N. 265: Walters v. Coghlan, L. R. 8 Q. B. 61.

Should the money be paid into court as security for the appeal, the formalities of payment would not be looked at: Griffin v. Coleman, 4 H. & N. 265; Walters v. Coghlan, L. R. 8 Q. B. 61.

The bond would be good without any recitals: R. v. Wells, 17 U. C. R. 550.

If a Judge should improperly refuse to approve a bond, or a clerk to certify the proceedings, mandamus would lie against each of them: R. v. Wells, supra; In re Keenahan & Preston, 21 U. C. R. 461; R. v. Fletcher, 2 E. & B. 279; In re Linden v. Buchanan, 29 U. C. R. 1; and if the refusal was grossly wrong costs would probably be imposed: R. v. Langridge, 24 L. J. Q. B. 73.

When a Judge refuses a new trial and approves of the appeal bond his authority is at an end. He cannot reconsider the matter in either case, and make a fresh decision: G. N. Ry. Co. v. Mossop, 17 C. B. 130; Irving v. Askew, L. R. 5 Q. B. 208.

The bond, if in accordance with the statute, is a security for any debt awarded to be paid, and the costs of the suit and of appeal: Waddell v. Robertson, 26 U. C. R. 376.

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for any debt Waddell v. When the terms of the Judge's order as to payment have been complied with it then becomes the duty of the clerk to certify the proceedings.

Manitoba Cases.—Where the necessary sum has been paid into court or other security given with the sanction of the County Judge, and he has certified the case to the Appellate Court, the giving of a bond was held not to be a condition precedent to the hearing of the appeal under the Act then in force: Gerrie v. Chester, 5 Man. L. R. 258.

A certificate of the County Judge that the appeal book contained, "the evidence in substance taken at the trial" was held insufficient, and the appeal was struck out of the list: Winnipeg Waterworks Co. v. Winnipeg Street Ry. Co., 6 Man. L. R. 614. By the County Court Act, 1887, the giving security for, or depositing in court the amount for which judgment has been recovered, and a sum sufficient to cover the probable costs of the appeal is a condition precedent to the right to appeal. An objection that such conditions have not been complied with may be taken when the appeal comes on to be heard, and may be supported by affidavits: Mahon v. Inkster, 6 Man. L. R 253.

Where the Act required the bond to be filed in 21 days, and this was not done, the Judge of the inferior court held that the plaintiff was not entitled to appeal. But on appeal it was held that the Judge, being at liberty "to make such order allowing the appeal or otherwise," and the plaintiff having filed a bond, the appeal should be allowed, and the court ordered that the appeal be allowed on giving a bond to the satisfaction of the Judge appealed from. Held, also, that the provisions of the English County Court Acts are not applicable to Manitoba: McLeod v. Pearson, 1 West. L. T. 12.

Objection was taken that the security was not completed within ten days after the giving of judgment as apparently required under section 243 of the County Courts Act, 1887. The Court below gave judgment in plaintiff's favour on May 12th, 1890, a reversal was applied for to the same court on July 3rd, 1890, and notice of appeal was given on July 12th. The security was not perfected till September 10th following: Held, fatal. "Nothing in this Act requires the appellant to give notice to the opposite party that the appeal has been set down." The dictum of Willes, J., in Great Northern Ry. Co. v. Mossop, 17 C. B. 129, approved; Mulvihill v. Lachance, 1 West. L. T. 171.

Justification.—The parties executing the bond are to justify in like manner as bail are required to justify: R. S. O. c. 47, s. 48; see as to justification of bail, C. R. 1067-1088.

Bail must be either housekeepers or freeholders, see Form 46 to Consolidated Rules. As to who is a freeholder see notes to section 35.

To be a "housekeeper."—It is submitted that he should live in this Province: Hughes v. Sterling, 11 Price, 158. A person in lodgings, in England, having a house in Scotland, was held inadmissible as bail: Anon., 1 Dowl. 61. He must be the bona fide tenant of the house in his own right, enjoying its benefits and bearing its burdens: Lush's Prac., 3rd Ed., 716. Where the house was taken in the name of one, because the landlord would not trust the other, the bail of the latter was rejected: Anon., 1 Chitty, 316. So also was the tenant of a tap belonging to an hotel, the lease being taken out by the hotel-keeper: Walker's Bail, 1 Chitty, 316. So a party who occupies every room but one, which was reserved for the landlord, who paid all taxes: Slade's Bail, 1 Chitty, 502. Where a person hired a house, but was prevented from entering through illness in the family of a former tenant, he was held inadmissible: Bold's Bail, 1 Chitty, 288. On the other hand, a person who had taken a house, occupied by lodgers, and received rent from one of them, was deemed a "housekeeper," though he had never occupied it himself; Coehn v. D.C.A.-15

Section

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Section 149 Waterhouse, 8 Moore, 365. A person who lived in lodgings, but paid his proportion of the rent and taxes of a house occupied by his partner, where the business was carried on, was held admissible: Savage v. Hall, 1 Bing. 430. It is no objection that the house is kept as a gambling-house: Anon. 1 Dowl. 160. If the party giving security is to have a commission for doing so, he should be rejected: Foxall's Bail. 7 D. & P. 783. It is no objection to the security that the party appealing agreed to indemnify the sureties, for that is the legal position of the parties anyway; Vestris's Bail, 4 Scott, 395.

Objections to Sureties. -It is no objection that the sureties do not know the appellant (Jameson's Bail, 2 Chitty, 97), or that they became security at the request of the appellant's attorney: Hunt v. Blaquiere, 4 Bing. 588; the property should be situated in the Province: Levy's Bail, 1 Chitty, 285; see also Swinburne v. Carter, 23 L. J. Q. B. 16. With the opposite party's consent, persons who are not householders may justify: Saggers v. Gordon, 5 Taunt. 174; or the justification may be waived altogether: Park Gate Iron Co. v. Coates, L. R. 5 C. P. 634. The property need not be seizable on which the surety justifies, but may consist of book debts, money out on mortgage, bills of exchange, shares, etc., as well as stock-in-trade and household furniture: Pierpoint v. Brewer, 15 M. & W. 201. The fact that the surety has property to the amount required is not enough; he must have it over and above what will discharge all his legal liabilities, and the discovery of orrcumstances, which raise a reasonable suspicion of his solvency, will, if unexplained, render him inadmissible: Lush's Prac. 3rd Ed. 717. The acceptor of a bill of exchange cannot go security for the drawer, because, being himself primarily liable, his default shews him not to be a responsible party: Anon. 1 Dowl. 183; but a drawer or indorser may be security for the acceptor: Prine v. Beesly, 5 Dowl. 477. If it appears that the person is in arrears for his rates or taxes: Lewis v. Thompson, 1 Chitty, 309; or a dishonoured bill outstanding: Barnesdall v. Stretton, 2 Chitty, 79: Cross v. Williams, 1 Tyr. 531; that he has been arrested several times: Rawlins' Bail, 1 Chitty, 3; or the like, and the matter be not satisfactorily explained, the security should be rejected. An undischarged insolvent cannot be security, because his property continues liable for his former debts: Anon. 2 Chitty, 77; Holm v. Booth, 2 Chitty, 78; Insolvent Act, 1875, section 16. Where the qualifying property consists of money deposited in the hands of the surety, to indemnify him, it would be insufficient; Nicholl's Bail, 1 Hodge's, 77. Bail was rejected where the person did not know whether he had been arrested or not for two years: Newman's Bail, 2 Chitty, 95. So a foreigner, having no property in the Province: Boddy v. Leyland, 4 Burr. 2526; Levy's Bail, 1 Chitty, 285, should be rejected. A person would be rejected who had gone other security, and his property not enough for both: Varden v. Wilson, 1 Chitty, 287. The fact that the surety kept a gaming house: Anon. 1 Dowl. 160; or a brothel: Gouge's Bail. 3 Dowl. 320; or that he has suffered the penalty of crime: Hatfield's Bail, 2 Chitty, 98, would be no objection. The inquiry will not be as to the character of the bondsmen, but as to the property on which they justify.

It was held not to be sufficient ground to reject one of two bail, that one of his creditors agreed to compound for his debt for two shillings in the pound: Daniell v. James, 2 P. R. 195.

Approval of Bond.—The respondent is entitled to a bond free from all possible objections: Jones v. Macdonald, 14 P. R. 535.

After hearing all objections to the approval of the bond the Judge will, if he determines to approve it, indorse such approval upon it and affix his signature thereto. After it has been approved, the bond must be filed with the clerk of the Division Court, to remain with him until after

the decision of the appeal, when the Judge will order it to be delivered up Sections to the successful party: R. S. O. c. 47, s. 49. Such a bond no matter 149-150 what the amount of the penalty might be is suable in the Division Court:

When the Judge has allowed the bond, or the money has been paid into court, and the clerk has certified the proceedings, the Court of Appeal will not refuse to hear the appeal nor entertain an application to quash it on the ground that the bond is insufficient, or that the security was not given in time: Haworth v. Fletcher, 20 U. C. R. 278, 280; Penton v. G. T. Ry Co., 28 U. C. R. 367, 375; McLellan v. McClellan, 2 L. J. N. S. 297; Baby v. Ross, 14 P. R. 440. It by no means follows that if it should be made to appear that the clerk had certified the case without requiring any security at all, or if a bond utterly illusory, or so defective in form as to be no security at all, had been inadvertently approved, the respondent would be without remedy, for the court might decline to hear the appeal until the error had been rectified: per Osler, J.A., Baby v. Ross, 14 P. R. at p. 445.

The giving of security is a condition precedent to the certification of the case, but when the case is certified, the Court of Appeal is authorized, if not compelled to act upon the case so certified: Penton v. G. T. Ry. Co. 28 U. C. R. 375.

Payment into court .- Payment to the clerk will amount to payment into court. The sum deposited may be smaller than \$50, if the Judge so directs. An order for payment out will be necessary after the determination of the appeal.

The proceedings are stayed pending the appeal: see R. S. O. c. 47,

150. Upon an application for a new trial in any cause Agent for service. wherein either party may appeal, each party shall leave with the Judge by whom the application is heard, a memorandum in writing of the name of some person resident within the county town of the county or united counties in which the cause was tried, with his place of abode, upon whom the notice of appeal, and all other papers thereafter requiring service, may be served for him, and service upon such person, or, in his absence, at his place of abode, shall be sufficient service thereof; and, in the event of failure to leave such memorandum by either party, all papers requiring service upon him may be served upon the clerk of the Division Court where the trial was had, or left at his office, for the person so failing to leave such memorandum, and such service shall be good service; the clerk shall, in such case, forthwith mail, by registered letter, all such papers so served upon him to the person entitled to the same. V. c. 8, s. 19.

Notice of appeal is to be given to the respondent when the appeal s set down: see section 152.

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Section 151

Evidence, etc., to be certified.

151. Upon the bond being approved by the Judge, or the deposit being paid into court, the clerk of the court in which the action or proceeding is pending, shall, at the request of the appellant, his counsel, solicitor, or agent, furnish a duly certified copy of the summons with all notices indorsed thereon, the claim, and any notice or notices of defence, and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted, or refused therein, together with such notes of the Judge's charge as have been made, the judgment or decision when in writing, or the notes thereof, and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the questions raised by the appeal; the clerk shall also furnish to the respondent, when required so to do. a duplicate copy of the proceedings so furnished to the appellant, or such portion thereof as may be required by him, and for every copy he shall be entitled to receive the sum of five cents per folio of one hundred words. 43 V. c. 8, s. 20.

Approved by the Judge.—The Judge is required to approve the bond under this section. He cannot delegate the right to allow the bond: Haskins v. St. Louis & S. E. Ry. Co., 106 U. S. 106; Harrington v. Edison, 11 U. C. R. 114; nor can hearbitrarily decline to do so: Young v. Brompton, 1 B. &. S. 675.

Clerk to certify the proceedings.—It is imperative on the clerk to furnish a duly certified copy of the proceedings, after the conditions of appeal have been duly complied with. The request to the clerk need not be in writing, but had better be so in order to prevent mistakes. For forms of certificate see Forms.

A duplicate of this certificate shall also be furnished by the clerk to the respondent or such portion of it as he may require on payment of the fee mentioned.

After the clerk has certified the copy of proceedings he could not alter or add to the same: Warner v. Riddiford, 4 C. B. N. S. 180, unless sent back to him for the purpose. L. & N. W. Ry. Co. v. Grace, 2 C. B. N. S. 555.

The Judge's decision should be stated publicly, and the reasons for it, before the certification of the papers, and not sent afterwards to the Court of Appeal: Brown v. Gugy, 2 Moo. P.C. N. S. 341; but the court will not refuse to receive a certificate of the Judge if there are no notes of evidence; see Sullivan v. Francis, 18 A. R. 121. The certificate should not be made ex parte, but should be settled in the presence of both parties; Re Ryan v. Simonton, 13 P. R. 299.

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152. The appellant shall within two weeks after the Section approval of the security or deposit being paid into court, or setting at such other time as the Judge of the said County Court down appeals. may by order in that behalf provide, file the said certified copy with the Registrar of the Court of Appeal, and shall thereupon forthwith set down the cause for argument before a Judge of the said Court of Appeal, and shall forthwith give notice thereof, and of the appeal, and of the grounds thereof, to the respondent, his counsel, solicitor, or agent, at least seven days before the day for which the same is set down for hearing, and the said appeal may be heard and disposed of by a single Judge of the Court of Appeal, and Hearing. he shall have power to dismiss the appeal or give any judgment and make any order which ought to have been made, and he shall give such order or direction to the court below touching the decision or judgment to be given in the matter as the law requires, and shall also award costs to the costs. party in his discretion, which costs shall be certified to and form part of the judgment of the court below, and upon receipt of such order, direction and certificate, the court below shall proceed in accordance therewith. 43 V. c. 8, s. 21; 47 V. c. 10, s. 10 (4).

Within two weeks.—This means fourteen days. Where a statute provided that notice of appeal should be given "within one week" before such appeal was to be heard, and notice was given on the 22nd for the 29th, it was held that the notice was insufficient. R. v. Sweeney, 2 Ir. I. R. 278. See also notes to section 145. If a bond were approved on the 1st, the case might be set down on the 15th.

File the copy, etc.—Whether the Court of Appeal would consent to hear the case if this was not done would be a matter for them to consider. It is submitted that the Court of Appeal would not (if it could) allow the appeal to be set down or argued after the time prescribed by the statute, unless the parties had acted as if the appeal was entered: Figg v. Wilkinson, 9 Ex. 475; Park Gate Iron Co. v. Coates, L. R. 5 C. P. 634.

The appeal must be enter A b-fore the day mentioned in the notice of the hearing of it: Donovan v. Brown, 4 Ex. D. 148. If any mistake should be made in copying the proceedings, or in setting down the appeal, there would appear to be no objection to an abandonment of these proceedings and taking them afresh, provided such could be done within the prescribed time: R. v. W. R. Yorkshire, (Jus.), 3 T. R. 778; Norton v. L. & N. W. Ry. Co., 11 Ch. D. 118.

Give notice thereof.—Notice of setting down the appeal for argument, and of the appeal and grounds thereof, must be given forthwith after the

Section 152 appeal is set down, and served on the respondent, his counsel or agent, "at least seven days before the day for which the same is set down for hearing." "At least seven days" means seven clear days, excluding both the day of giving the notice and the day set for argument: notes to section 145. Reasonable certainty only would be required in the notice, and it should not be criticized too closely or construed too strictly: R. v. West Houghton, 5 Q. B. D. 300 per Denman, C J., at p. 302; In re West Jewell Tin Mining Co., Little's Case, 8 Ch. D. 806.

It may be signed by the appellant's solicitor: R. v. Middlesex, (Jus.), 1 L. M. & P. 621, or in the appellant's name by the clerk to his solicitor, with the appellant's authority: R. v. Kent, (Jus.), L. R. 8 Q. B. 305.

In strictness, perhaps, it need not be signed at all: R. v. Nichol, 40 U. C. R. 76.

The "grounds" of appeal must be stated in the notice. A general statement that the judgment was erroneously made would be insufficient: Torrence v. McPherson, 11 U. C. R. 200.

It was held that where the notice stated that the appellent was not guilty of the offence it was a compliance with the Act, as it meant that all the ingredients of the offence were disputed: R. v. Newcastle-upon-Tyne, (Jus.), 1 B. & Ad. 933.

Any grounds of appeal could be set out in the notice in ordinary and concise language and the appeal should be heard if it substantially informed the opposite party of the grounds intended to be relied on. See note to section 176.

It is submitted that the omission of the grounds of appeal should not prevent its being heard, such being for the information of the Court of Appeal, and not a condition precedent to hearing the case: Evans v. Matthews, 26 L. J. Q. B. 166; Grant v. G. W. Ry. Co., 8 C. P. 348; Smith v. Muirhead, 18 U. C. R. §; Exparte Bromley, Inre Redfearn, 12 L. T. N. S. 783; Richardson v. Silvester, 29 L. T. N. S. 395.

If one of the grounds of appeal is misdirection or non-direction of the jury, the notice should state how and in what manner the Judge misdirected or failed to direct the jury: Furlong v. Reid, 12 P. R. 201; Pfeiffer v. Midland Ry. Co., 18 Q. B. D. 243.

For form of notice of appeal see Schedule of Forms.

Where there is a fatal objection to the right of appeal, the respondent should apply to quash the appeal, and not wait until the hearing to urge such objection to its competency; otherwise he will be allowed only the costs of a motion to quash: see R. S. O. c. 44, s. 46; Tronson v. Dent, 8 Moo. P. C. 420; Reid v. Ramsay, Cassel's Dig., 239; Gendron v. McDougall, ib. 249; O'Sullivan v. Lake, 16 S. C. R. 636.

If a party appeals from a judgment in his favour claiming relief inconsistent with that granted by the judgment appealed from, and, pending the appeal, proceeds upon the judgment and attains to relief granted thereby, his appeal will, on motion, be quashed: International Wrecking Co. v. Lobb, 12 P. R. 207. A party cannot accept the benefit of an order and then endeavour, by an appeal, to reject a burdensome provision: Pearce v. Chaplin, 9 Q. B. 802.

Judgment in Appeal.—The Court of Appeal cannot give any other judgment than that which ought to have been given in the court below.

Where a case has been tried by a jury, if there is any evidence by which the verdict can reasonably be supported the court cannot, it is submitted, do anything but grant a new trial, and cannot give a final judgment for the appellant: Jonas v. Adams, 20 L. J. Q. B. 397; Connecticut Life Ins. Co. v. Moore, 6 App. Cas. 641; Toulmin v. Millar, 12: App. Cas. 746; see notes to section 114.

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It is submitted that the Judge in Appeal could not adjourn the case Sections to the sitting of the full court, but must himself hear and determine it: 152-153 Button v. Woolwich Building Socy., 5 Q. B. D. 88.

Where judgment has been given for the plaintiff, the court has, it is submitted, power to order a non-suit: see section 114; Fuller v. Cleveley, 17 Jur. 786; Rule 122.

If the respondent appears and the appellant does not, the appeal will probably be dismissed with costs: Sherburne v. Middleton, 9 C. & F. 72; Scanlan v. Usher, 8 C. & F. 561; Smith v. Durant, 9 H. L. Cas. 192; Berry v. Exchange Trading Co., 1 Q. B. D. 77; and it is submitted that in the absence of the appellant's counsel, the counsel for the respondent would not be called upon to sustain the judgment of the court below: Gardiner v. Simmons, 1 C. & F. 35; see also notes to section 153.

Where an appeal was dismissed because no counsel appeared, the court allowed the case to be restored to the paper the following term on an affidavit that the appellant's counsel had been prevented from attending by dangerous illness in his family: McAllister v. Cushing, 8 C. L. T. 447;

A case once decided on appeal would not, it is submitted, be reconsidered: Thellusson v. Rendlesham, 7 H. L. Cas. 429.

On the case coming back to the Division Court, it is submitted that a copy of the certificate of the Court of Appeal should be filed upon which the officers of the court should act.

It will be observed that an "order or direction" is to be given to the court below, which court "shall proceed in accordance therewith."

If the security be given and the papers filed in the Court of Appeal but not set down for hearing, a motion might be made to a Judge of a Court of Appeal, in Chambers, to dismiss the appeal for want of prosecution: see Platt v. G. T. Ry. Co., 12 P. R. 380.

153. The costs taxable, as between party and party costs. upon or connected with any appeal shall be the actual disbursements and no greater amount over and above actual disbursements than \$15, inclusive of counsel fee; the costs of such appeal, as between solicitor and client, shall be taxable on the county court scale : section 156 of The Rev. Stat. Judicature Act shall not apply to appeals made under this c. 44.

Act. 43 V. c. 8, s. 22.

Costs in appeal.—Where point not raised in court below, costs may be disallowed : Kelly v. Ottawa St. Ry. Co., 3 A. R. 616, 627; Garrett v. Roberts, 10 A. R. 650; Cooper v. Cooper, 13 App. Cas. 88. But costs are usually allowed to the successful party, unless there is something exceptional in the circumstances: Eddy v. Ottawa City P. Ry. Co., 31 U. C. R. 569, 576; In re Shaver v. Hart, 31 U. C. R. 609; Herbert v. Park, 25 C. P. 57; Wambold v. Foote, 2 A. R. 579; Winger v. Sibbald, 2 A. R. 611; Connybeare v. Farries, L. R. 5 Ex. 16; Ashby v. Sedgwick, L. R. 15 Eq. 245; Booth v.Turle, L. R. 16 Eq. 182.

Should the Judge inadvertently omit to provide for costs when giving judgment, he might afterwards do so even though the certificate should have been issued: Hardy v. Pickard, 12 P. R. 428; Fritz v. Hobson, 14 Ch. D. 542; C, R. 780.

Sections 153-154 Should the appeal be abandoned, it is submitted that the costs should be payable by the party abandoning it: Charlton v. Charlton, 16 Ch. D. 273; and if the appellant appears, and the respondent does not, the appellant should get his costs on dismissal of the appeal: Sherburne v. Middleton, 9 C. & F. 72; Scanlan v. Usher, 8 C. & F. 561.

The costs are "to be certified and to form part of the judgment of the court below." The costs of appeal could not be recovered by process of the Court of Appeal: see Philipps v. Philipps, 5 Q. B. D. 60; McArthur v. Southwold, 8 P. !!. 27.

As between parties to the suit, only \$15, and the "actual disbursements" are taxable to the successful party; yet as between solicitor and client the County Court tariff is adopted. The fees payable on the entry of every appeal, and on every judgment, decree or order of the Court of Appeal, under section 156 of the Judicature Act, are not applicable to appeals from the Division Court.

JURIES.

When a jury may be required.

154. Either party may require a jury in tort or replevin where the sum or the value of the goods sought to be recovered exceeds \$20, and in all other cases where the amount sought to be recovered exceeds \$30. 43 V. c. 8, s. 43.

Either party may require a jury.—The right to have a jury summoned under this section depends upon whether the suit is one for damages exceeding \$20, in tort or replevin, and upwards of \$30 in all other actions, and also upon the giving of notice and the payment of the proper fees as required by section 156. If these requirements are complied with, and a jury has been properly demanded, the Judge cannot properly try the case without a jury: Hamlyn v. Betteley, 6 Q. B. D. 63; Bank of B. N. A. v. Eddy, 9 P. R. 468, and he has no power to withdraw the case from the jury, the verdict must be theirs: Lewis v. Old, 17 O. R. 610. In that case a notice for jury was given by the defendant. After the evidence was closed the Judge declined to submit any question to the jury except the amount of damages. The jury then assessed the damages. An application was made for a new trial, which was refused, and prohibition was then applied for. In delivering the judgment of the court, Galt, C.J., says: "The defendant had a right to insist that every question should be submitted to them, (the jury) and a Judge has not the power in a Division Court suit to withdraw the case from them. The learned Judge has power to instruct the jury as to their verdict, and if they act contrary to his instructions he can grant a new trial, but he cannot withdraw the case from them: the verdict must be theirs." This decision was affirmed on appeal to the Divisional Court, in which it was held, that when the plaintiff furnishes evidence which the Judge thinks sufficient "to support his case, the case cannot be withdrawn from the jury: the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence by no means concludes the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant The Judge in this case exceeded his jurisdiction by assuming the functions of the jury: and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was a ground for prohibition."

See also R. v. Harwood, 22 L. J. Q. B. 127; Ford v. Taylor, 3 C. P. D. 21; Bordier v. Burrell, 5 Ch. D. 512; Wood & Ivery (Ltd.) v. Hamblet,

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6 Ch. D. 113; Powell v. Williams, 12 Ch. D. 234, and cases cited in Sections notes to section 155.

At one time it was believed that the withdrawal of a juror operated as a legal determination of the action. That is not so. It is no determination except in this sense of the word, that unless something very special happens the court will hold the parties to their understanding and will stay any further proceedings in the action: Thomas v. Exeter Flying Post Co., 18 Q. B. D. 822.

And it is doubtful if the withdrawal of a juror has any effect in a Division Court: Norburn v. Hilliam, L. R. 5 C. P. 129.

Nonsuit.—As to power to nonsuit, see notes to section 144.

155. (1) Either party to an interpleader issue in a Right to jury in Division Court may require a jury to be summoned to try interpleader. the issue and in such case he shall, within five days after the day of service of the summons on him, give to the clerk or leave at his office notice in writing, requiring a jury, and shall at the same time pay to the clerk the proper fees for the expenses of the jury, and thereupon a jury shall be summoned according to the provisions of this Act.

(2) Sections 115, 116, and 208, shall extend and apply to all interpleader issues and other actions mentioned in sub-section 2, of section 148. 47 V. c. 10, (1-3).

Interpleader Issue.—As to parties to an interpleader issue, see section 269 and notes thereto.

To try the issue. - As to the subject of the right to a jury, see notes

Formerly a jury was not allowed in interpleader cases. A perusal of Munsie v. McKinley, 15 C. P. 50, will show how sternly a jury was prohibited in such cases. The issue in interpleader cases is whether or not the property was at the time of the seizure: Van Every v. Ross, 11 C. P. 133; Culloden v. McDowell, 17 U. C. R. 359; McDowell v. McDowell, 10 U. C. L. J. 48; Watts v. Howell, 21 U. C. R. at p. 259, the property of the claimant as against the execution or attaching creditor: Doyle v. Lasher, 16 C P. 263; Merchants Bank v. Herson, 10 P. R. 117: Doran v. Toronto Suspender Co., 14 P. R. 103; but if the claimant is in possesion at the time of the seizure, the onus is upon the execution creditor to shew that the goods were the goods of the debtor: Duncan v. Tees, 11 P R. 66; Winfield v. Fowlie, 14 O. R. 102; Dominion S. & I. Co. v. Kilroy, 7 C. L. T. 87. Though the debtor may be estopped from claiming the goods as against the claimant, the execution creditor may shew that the claimant has no valid title: Richards v. Jenkins, 18 Q. B. D. 451; see notes to section 269.

Within five days .- See notes to sections 109 and 147. The Judge could not extend the time: Brown v. Shaw, J Ex. D. 425; Tennant v. Rawlings, 4 C. P. D. 133; Whistler v. Hancock, 3 Q. B. D. 83; In re Prescott Election, 9 P. R. 481; Barker v. Palmer, 8 Q. B. D. 9.

In ordinary actions a plaintiff must give notice in writing when entering his claim with the clerk, and the defendant within five days after the day of service.

Sections 155-157 In interpleader cases there is no distinction as to time in respect of plaintiff or defendant.

Notice in writing.—The notice is a condition of the right to have a jury summoned. A verbal notice would not be sufficient: see Fletcher v. Baker L. R. 9 Q. B. 370; Re McGregor v. Norton, 13 P. R. 223, If a jury be not properly summoned, a Judge should not try the case with a jury against the protest of counsel for the opposing party: see Hamlyn v. Betteley, 6 Q. B. D. 63, unless the jurors were called under section 168. But if both parties appeared at the trial and neither objected to the summoning or empanelling of the jury, that would amount to a waiver of any irregularity or emission in respect of the notice: Exparte Morgan. In re Simpson, 2 Ch. D. 72.

Prepayment of fees. - As to the fees to be paid to the jurers, see section 172. The clerk is not bound to accept the notice for jury, nor to act on it without prepayment of the expenses of the jury. He should not exact more than should be reasonably required for the purpose of having a jury summoned, but he is entitled to prepayment not only of his own fees in connection with the work, but to those of the bailiff as well.

A jury shall be summoned.—This is imperative. Either party by complying with the terms of the statute has a right to have a jury summoned and his case tried by a jury, and the Judge cannot deprive him of that right; see note to section 154 see also Sugg v. Silber, 1 Q. B. D. 362; Clarke v. Cookson, 2 Ch. D. 746; \mathbf{Ford} v. Taylor, 3 C. P. D. 21; Clarke v. Skipper, 21 Ch. D. 184; Re Lewis v. Old, 17 O. R. at p. 613.

The provisions of this Act.—The provisions of the Act with respect to (1) the order in which cases are to be tried (section 115), (2) consenting not to appeal (section 116), (3) counsel fees (section 208) are here made applicable to interpleader cases and to causes in which the parties consent to an appeal: Section 168 is also applicable to an interpleader issue.

Parties to give notice to Clerk if they require a jury.

moned to try the action, he shall give notice thereof in writing to the clerk at the time of entering his account, demand or claim, and shall at the same time pay: the clerk the proper fees for the expenses of such jury; ad in case the defendant requires a jury, he shall, within five days after the day of service of the summons on him, give to the clerk or leave at his office the like notice in writing, and shall at the same time pay the proper fees as aforesaid; and thereupon, in either of such cases, a jury shall be summoned according to the provisions hereafter contained. R. S. O. 1877, c. 47, s. 110.

See notes to sections 154 and 155.

The plaintiff must demand the jury at the time of entering the claim.

Who may be jurors. 157. [Unless exempted by *The Jurors' Act*, every person whose name appears on the last published voters' list of any municipality, partly or wholly situate within the limits of any Division Court, and who resides within the said

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division, and whose name is marked "J," as provided in sections section 23 of the said Act shall be liable to serve as a juror for the Division Court in such division. 52 V. c. 12, s. 17.

Jurors.—This section makes provisions for juries in Division Courts, and therefore the general Act, R. S. O. c. 52, respecting jurors and juries does not apply.

Sections 157, 158 and 159 of The Division Courts Act were repealed by 52 V. c. 12, ss. 17, 18 and 19, and the sections here given substituted

Unless exempted by the Jurors' Act.—The persons exempted by The Jurors' Act are enumerated in sections 6-12 of that Act, R. S. O. pp. 611-614.

Resides within the division.—See notes to section 81.

Of the said Act. - The following is the section of The Jurors' Act referred to:

"23. In order to facilitate the selection of jurors, the clerk shall, in making out the voters' list, in the column containing the number of the voter on the roll, or in a separate column provided for the purpose beside the same, write or mark the letter "J" upon the voters' list opposite the name of every male person over twenty-one and under sixty years of age who, by the roll, appears to possess the property qualification requisite to qualify him to serve as a juror; and such voters' list shall shew, at or near the end thereof, the aggregate number of names of persons upon such list qualified to serve on juries, and in the case of cities and towns the said list shall give the same information for each ward, and it shall not be necessary for the selectors to refer to any name on the assessment roll which has not the letter "J" opposite it in the voters' list, unless the selectors suspect that some names are not properly marked."

158. The Jurors to be summoned to serve at any Jurors, Division Court shall be residents of the said division, and selected shall be taken from the last published voters' lists of the moned. municipalities, partly or wholly within the division, and shall be summoned in rotation, beginning with the first of such persons in such voters' lists who resides within the said division, and whose name is marked "J," as provided in the preceding section, and if there be more than one municipality partly or wholly in the division, beginning with the voters' list for the municipality within which the Court is held, and then proceeding to that one of the other voters' lists which contains the greatest number of such persons' names, and so on until all the lists have been gone through, after which they may be gone through again in the same order. But if at any time it shall appear to the County Judge that the cost of summon-

Sections 159-159

ing a jury is excessive, by reason of the residences of the persons liable to be selected in the ordinary course being in a distant portion of the division, the County Judge may order the Clerk of the Division Court to commence at the first name marked "J," as before provided upon the voters' list of any municipality partly or wholly within the division.] 52 V. c. 12, s. 18.

Summoning jurors.—Under this section the clerk of the Division Court, in summoning jurors, must go through all the names which are on the voters' list of the municipality or municipalities within the division in rotation, beginning with the list of voters for the municipality within which the court is held, and when that is exhausted proceeding to that one of the other voters' list which contains the greater number of such persons' names: and so on until all the lists have been gone through.

The Judge is empowered, however, when a distant municipality is reached, in order to save expense, to order that the clerk shall take the list for a nearer municipality.

The improper selection of a jury can be taken advantage of by either party at the trial. In such cases it would be the duty of the Judge, if he found any irregularity in that respect to exist, to postpone the trial of the cause so that a jury might be properly summoned if both parties would not consent to his trying it without a jury. The irregularity being that of an officer of the court, neither party would be allowed to be prejudiced by it. Actus curice neminem gravabit.

Clerk of the municipality to furnish Division Court Clerk with copy of voters' list. 159. [The clerk of every municipality shall furnish each Division Court clerk within whose division the said municipality is partly or wholly situate, with a correct copy of the voters' list of the said municipality immediately after the publication of the same in each year; and after a new voters' list is furnished to him the Division Court clerk shall take the names of jurors therefrom, beginning as nearly as may be at the part of the list corresponding to the place where he left off in the previous list.] 52 V. c. 12, s. 19.

The clerk of every municipality.—Provision is made by section 164 for the punishment of the clerk of the municipality for breach of his duty under this section. It is submitted that he would be subject to no other liability: Finlay v. Miscampbell, 20 O. R. 29; Cowley v. Local Board, W. N. (1892), 141. As to power of local legislatures to punish, see R. v. Wason, 17 A. R. 232; R. v. Bittle, 21 O. R. 66f.

If no punishment has been provided the clerk might have been indictable: see Roscoe's Crim. Ev. 9th Ed. 783; Criminal Law Code, 1892, s. 138.

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Required to be tried by or before a jury.—See notes to sections 154, 155.

amended by 52 V. c. 12, s. 20.

At least three days.—This means clear days: see notes to sections 109 and 147; McLean v. Pinkerton, 7 A. R. 490.

At the residence of the Juror.—The service need not necessarily be personal. The summons may either be served personally on the juror: see note to section 99; or left with a grown up person at the residence of the juror: notes to sections 90, 109, and 111.

Verified by the oath of the balliff.—This clause within brackets is added to the original section by 52 V. c. 12, s. 20. See notes to section 105.

161. Either of the parties to a cause shall be entitled Parties entitled to to his lawful challenge against any of the jurors in like challenge. manner as in other courts. R. S. O. 1877, c. 47, s. 115.

The right of challenge.—The Jurors Act declares the right of peremptory challenge to "any four" of the jurors drawn to serve on the trial of the cause: R. S. O. c. 52, s. 110.

The right of challenge is a common law right, and cannot be taken away except by express enactment: Barrett v. Long, 3 H. L. Cases, 395. If alienage is relied on as a ground of challenge, the party who has an opportunity of making it, and neglects it, cannot afterwards make the objection: R. v. Sutton, 8 B. & C. 417. A juryman should not have an interest in the result of the suit: Bailey v. Macaulay, 13 Q. B. 815. But where a public company was a party to an action, the mere fact that one of the jurymen was a shareholder in the company was held no ground for granting a new trial: Williams v. G. W. Ry. Co., 3 H. & N., 869; see also Richardson v. Canada West Farmers' Ins. Co., 17 C. P. 341. A juror cannot be challenged because in a previous case he had shewn some dissatisfaction with the law as laid down by the Judge in favour of the party challenging: Pearse v. Rogers, 2 F. & F. 137. Want of qualification (except in respect of property) is a good ground of challenge: chapter 52, section 108. Because a juror affirms, affords no ground of challenge: section 111. "If a juror be challenged for cause before any juror sworn, two

Sections 162-164 triers are appointed by the court; and if he be found indifferent and sworn, he and the two triers shall try the next challenges; and if he be tried and found indifferent, then the first two triers shall be discharged, and the two first jurors tried and found indifferent shall try the rest:" Roscoe's Crim. Ev. 8th Ed. 210; R. v. Smith, 38 U. C. R. 218. The challenge of a juror must be before the oath is commenced. The moment the oath is begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so; but if the juror takes the book without authority, neither party willing to challenge is to be prejudiced thereby: R. v. Frost, 9 C. & P. 129. Upon a challenge for cause, the person making the challenge must be prepared to prove the cause: R. v. Savage, 1 Moo. C. C. 51.

Penalty on jurors disobeying summons.

162. Any juryman who, after being duly summoned for that purpose, wilfully neglects or refuses to attend the court, in obedience to the summons, shall be liable to a fine in the discretion of the Judge, not exceeding \$4, which fine shall be levied and collected with costs, by the same process as any debt or judgment recovered in the said court, and shall form part of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 116.

Not Exceeding \$4 .- No other punishment, than that presented by the section, could be imposed. R. v. Lefroy, L. R. 8 Q. B. 134.

It is submitted that the word "wilfully" here means of his own free will, viz., that he knew he had been summoned and, being a free agent, did not attend: Re Young v. Harston, 31 Ch. D. 174; per Bramwell, B.; Smith v. Barnham, 1 Ex. D. 419; Miles v. Roe, 10 P. R. 218. Neglect or refusal to attend is a contempt of court for which the statute provides a remedy: see Ex parte Lees and The C.C. Judge of Carleton, 24 C. P. 214. If not summoned three days "at least," the juror would not be in default: Wagner v. Mason, 6 P. R. 187.

Service as juror at Division Court not to exempt him from serving in Courts of Record.

163. Service as a juror at a Division Court shall not exempt such juror from serving as a juror in any Court of Record; and no person shall be compelled to serve as a juror in any Division Court who is by law exempted from serving as a petit juror in the High Court. R. S. O. 1877, c. 47, s. 117.

Proceedings against clerk of municifurnish copy of voters'

164. [If any clerk of a municipality, for six days after demand in writing, neglects or refuses to furnish the clerk of a Division Court, within the limits of which the municipality for refusing to pality for which he is clerk is partly or wholly situate, with a correct copy of the voters' list as provided in section 159 of this Act, the clerk of the Division Court may issue a summons to be personally served on the said clerk of the rent and if he be charged, e rest:" 18. The moment aking the out if the challenge challenge to prove

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municipality, three days at least before the sitting of the Sections Court, requiring him to appear at the then next sitting of the Court, to shew cause why he refused or neglected to comply with the provisions of the said section.] 52 V. c. 12, 8, 21,

For six days.—This is exclusive of the day on which the demand is made: Young v. Higgon, 6 M. & W. 49; and notes to section 125 ante.

Neglects or refuses.—It will be observed that the word "wilfully" is here omitted.

To "neglect" doing, is the omission to do some duty which the party is able to do: per Patteson, J., King v. Burrell, 12 A. & E. 468. When "negligently" is part of an offence it implies that the act constituting the offence shall have been done or caused by the alleged offender himself; proof that it was done by his servant, without more, will not bring the charge home: Chisholm v. Doulton, 58 L. J. M. C. 133. "Negligence is the omitting to do something which a reasonable man would do, or the doing of something which a reasonable man would not do:" per Alderson, B., Blyth v. Birmingham W. W. Co., 11 Ex. 781.

As to words "neglect or refusal" and "negligence or omission" in a statute, see Vogel v. G. T. Ry. Co., 10 A. R. 162; Cassel's Pig. 440.

Three days at least.—See notes to sections 109 and 147.

Personally served .- See notes to section 99.

For form of summons hereunder, see Schedule of Forms.

165. Upon proof of the service of the summons, the fine clerk Judge may, in a summary manner, inquire into the neglect of municipality for or refusal, or may give further time, and may impose such duty. fine upon the clerk of the municipality, not exceeding \$20, as he deems just, and may also make such order for the payment by the clerk of the municipality of the costs of the proceedings as to the said Judge seems meet; and all orders made by the Judge for the payment of a fine or costs shall be enforced against the clerk of the municipality by such means as are provided for enforcing judgments in the Division Courts. R. S. O. 1877, c. 47, s. 119; 52 V. c. 12, s. 22.

Upon proof.—See notes to sections 99, 111, 131, 132. By such means .- See notes to section 212.

166. The causes to be heard by the Judge alone shall Judge's and be set down for hearing in a separate list from the list of Jury list. causes to be tried by a jury, which two lists shall be severally called "The Judge's List," and "The Jury List," and the causes shall be set down in the lists in the order in

Sections 166-168

which they were in the first instance entered with the clerk; -"The Jury List" shall be first disposed of, and then "The Judge's List;" except where the Judge sees. sufficient cause for proceeding differently. R. S. O. 1877. c. 47, s. 120.

Heard by the Judge alone. - The policy of the law in regard to Division Court causes is that the Judge himself shall dispose of the case unless a jury has been summoned.

The convenience of jurors summoned was evidently considered in the framing of this section: the object clearly was to free them from duty as soon as the business would permit of it.

Five jurors to be empanelled,

167. Five jurors shall be empanelled and sworn to do justice between the parties whose cause they are required to try, according to the best of their skill and ability and to give a true verdict according to the evidence, and the verdict of every jury shall be unanimous. In the event of the panel being exhausted before a jury shall be ob-Judge may tained, the Judge may direct the clerk to summon from the body of the court a sufficient number of disinterested persons to make up a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge, sit and act as a juror as fully as though he had been regularly summoned. R. S. O. 1887, c. 47, s. 121; 43 V. c. 8, s. 49.

Verdict to be unani-

call tales.

Five jurors shall be empanelled and sworn.—See notes to section 154. Five jurors only shall be empanelled and sworn in a Division Court case. The oath is that they shall do justice between the parties whose cause they are required to try, according to the best of their skill and ability and to give a true verdict according to the evidence. It appears from this, that the party requiring a jury, has a right to insist that every question should be submitted to them, and a Judge has not the power to withdraw the case from them: per Galt, C.J., Lewis v. Old, 17 O. R. 611, ex3 cept that he might nonsuit if the plaintiff did not produce sufficient evidence: per Street, J., Ib. 614.

Provision is also made for a tales. The same rights to the parties would exist in regard to the further jurors as to those regularly summoned.

Judge may order jury to be empanelled to try any disputed

168. In case the Judge before whom an action is brought thinks it proper to have any fact controverted in the cause tried by a juzy, the clerk shall instantly return a jury of five persons present, to try such fact, and the Judge may give judgment on the verdict of the jury, or may grant ith the of, and ge sees. 0. 1877,

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ection is verted in return a ne Judge ay grant a new trial on the application of either party, in the same sections 168-169 way and under similar circumstances as new trials aregranted in other cases on verdicts of juries; this section shall extend and apply to the trial of an interpleader issue. R. S. O. 1877, c. 47, s. 122; 47 V. c. 10 s. 10, (2).

Any fact .- The parties are entitled to the decision of the Judge but the Judge may submit any contested fact to a jury, and would be bound to give judgment in accordance with the fact so found. The whole case should not be left to a jury called under this section, but merely the contested fact or facts.

Tried by a jury.—It is frequently the case that Judges find, to use the words of the late Lord Bramwell, that some facts can be better settled by, "that true Court of Equity, a jury, which, disregarding men's bargain and the law, will decide what is right in spite of all you can say to them," than by themselves: 5 L. J. N. S. 293.

May give judgment .- No doubt, the word "may" when used in an Act of the Assembly of Ontario, by the Interpretation Act, and on general principles of statutory construction, is permissive, but, it is submitted, that construction cannot apply in such a case as this.

"When a statute confers an authority to do a judicial or indeed any other act which the public interest, or even individual right may demand, it is imperative on those so authorized, to exercise the authority when the case arises and its exercise is duly applied for by a party interested, and having a right to make the application. In giving one person the authority to do this act, the statute impliedly gives to others the right of requiring that it shall be done; the power being given for the benefit, not of him who is invested with it, but of those for whom it is to be exercised. The legislature, in such cases, imposes a positive and absolute duty, and not merely gives a discretionary power, and it must be exercised upon proof of the particular facts out of which the power arises. When therefore, the language in which the authority is conferred is only directory, permissive or enabling, for instance, when it is enacted that the person authorized "may" or "is empowered" or "shall, if he deems it advisable," or that "it shall be lawful" for him to do the act, it has been so often decided as to have become an axiom, that such expressions have a compulsory force, unless there be special grounds for a different construction:" Maxwell on Stats. 218, 219; Macdougall v. Paterson, 11 C. B. 755; R. v. Bishop of Oxford, 4 Q. B. D. 525; Cameron v. Wait, 3 A. R. p. 194; The Supervisors v. the United States, 4 Wallace, 446 at pp. 446, 447; Stroud, 463.

169. If in any case the Judge is satisfied that a jury Judge may after having been out a reasonable time, cannot agree jury not agreeing, upon their verdict, he may discharge them, and adjourn etc. the cause until the next court, and order the clerk to summon a new jury for the next sitting of the court for that division, unless the parties consent that the Judge may render judgment on the evidence already taken, in which case he may give judgment accordingly. R. S. O. 1877, c. 47, s. 123.

D.C.A. -- 16

Sections 169-170 A reasonable time.—It is generally a matter of great difficulty for a Judge to determine what is "a reasonable time." Every case must depend upon its own circumstances, and whether obstinacy, prejudice or other improper influence has found a place in the jury-room, as it frequently does, it is for the Judge, as best he can, to determine that question before discharging a jury. See Stroud, 653.

Fees for jury fund.

170. There shall be paid to the clerk of the Division Court, in addition to all costs or jury fees, now by law payable, on every action entered where the claim exceeds \$20 but does not exceed \$60, three cents; where the claim exceeds \$60, but does not exceed \$100, six cents; and where the claim exceeds \$100, twenty-five cents; and the same shall be taxed and allowed as costs in the cause; and, on or before the 15th day of January in every year, every clerk shall return to the treasurer of the county a statement, under oath, shewing the number of actions originally entered in his court during the year previous, in which the claim exceeded \$20 but did not exceed \$60, the number in which the claim exceeded \$60, but did not exceed \$100. and the number in which the claim exceeded \$100; and he shall, with the statement, pay over to the treasurer the sum of three cents on every action so entered where the claim exceeded \$20 but did not exceed \$60; the sum of six cents on every action where the claim exceeded \$60, but did not exceed \$100; and the sum of twenty-five cents on every action where the claim exceeded \$100, together with all other moneys received by him for jurors' fees during the year: and the treasurer shall keep an account of all moneys so received by him under the head of "Division Court Jury Fund." 43 V. c. 8, s. 45.

Now by law payable.—The fees here provided for are in addition to those fees which the party who requires a jury is obliged to pay under the provisions of sections 155, 156.

The Legislature appears to have considered that a small tax should be imposed on all parties to suits entered in the Division Court with a view of providing a jury fund, and such tax or fee should be allowed as costs in the cause. It is the duty of the clerk, before the 15th of January in every year, to make the return to the County Treasurer, under oath, of the requirements of this section. It is important that these returns should be duly made, otherwise the clerk will be liable to indictment for neglect of duty, and to summary treatment by Government. See Roscoe, 9th Ed. p. 783; Criminal Code 1892, s. 188.

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171. In cities which include one or more entire divi- sections sions and no other fraction of a division the clerk shall make the return and payment, provided for by the next cities preceding section, to the treasurer of such city, who shall separate divisions. keep an account of such moneys in the same way as is provided in the case of county treasurers, and shall, on the presentation of the certificate of the Judge, forthwith repay to the clerk of the court the jurors' fees paid by him in the same manner as is hereafter provided in the case of county treasurers. 43 V.c. 8, s. 46.

The same returns are exacted of the clerk under this provision as are required under section 170. Too much stress cannot be laid on the necessity of this, as of all other returns, being duly made.

172. The clerk of every Division Court shall pay to Fees of jurors, every person who has been summoned as a juror, and who attends during the sittings of the court for which he has been summoned, and who does not attend as a witness in any cause, or as a nitigant in his own behalf, the sum of \$1; and having so paid the same, except in the cases in the next preceding section provided for, the presiding Judge shall so certify to the treasurer of the county, and shall deliver the certificate to the clerk, and the treasurer of the county shall, upon the presentation of the certificate to him, forthwith pay to the clerk, or his order, the amount which the clerk appears, by the certificate, to have paid the jurors as aforesaid: in the case of cities, other than those provided for by the next preceding section, and towns separated from the county, the amounts paid in by the clerks of the courts in such cities and towns, and the amounts paid in by the county treasurer to the clerks of such courts for jury fees, shall be taken into account in settling the proportion of the charges to be paid by the city or town towards the costs of administration of justice. 43 V. c. 8, s. 47.

Every person who has been summoned.—A juror who has been summoned is entitled to a fee of \$1, but one called by the Judge, is only entitled to the fee of 10c. allowed by the schedule to the original Division Courts Act.

Sections 172-173 To be entitled to this fee a juror must not attend as a witness in any cause, nor as a litigant, and it makes no difference whether he is paid as a witness or not, nor whether he is subpensed or not. No provision is made for payment of mileage and therefore none will be allowable.

The small fee formerly payable to jurors is not payable in addition to this.

The fee here mentioned is substituted for the other. "If an Act says a juror shall have £20 a year, and a new statute enacts that he shall have twenty marks, the latter necessarily implies that the qualification required by the former Act shall not be necessary and repeals that Act: Maxwell on Stats. 143; Zimmer v. G. T. Ry. Co., 21 O. R. 633; S. C. 19 A. R. 693. The same principle would apply here.

The juror is entitled to his fee, no matter whether he is sworn or challenged, or whether the case is settled or the like.

If a case is settled after a jury is summoned the clerk should, if possible, countermand the jury summonses, so as to save the jury fees.

A person sworn under section 167 as a tales would, it is submitted, be entitled to this fee. The section does not say how or when a juror is to be summoned in order to entitle him to his fee, so that in this latter case the juror would be equally entitled to it.

PROCEEDINGS TO GARNISH DEBTS.

Garnishment of debts.

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173. Subject to the provisions of the next section, when a debt or money demand of the proper competence of the Division Court, and not being a claim strictly for damages, is due and owing to one party from another party, either on a judgment of a Division Court or otherwise, and a debt is due or owing to the debtor from any other party, the party to whom such first mentioned debt or money demand is so due and owing (hereinafter designated the primary creditor), may attach and recover, in the manner herein provided, any debt due or owing his debtor (hereinafter designated the primary debtor), from any other party (hereinafter designated the garnishee), or sufficient to satisfy the claim of the primary creditor, subject always to the rights of other parties to the debts owing from such garnishee. R. S. O. 1887, c. 47, s. 124.

GARNISHMENT OF DEBTS.

The primary debtors claim.—A cause of action to be the subject of garnishment proceedings, before judgment, must conform to the following requirements: (1) It must be a debt or money demand of the proper competence of the Division Court; (2) not strictly for damages; and (3) It must be due and owing to one party from another party.

In order to determine what cases the statute applies to, it is necessary to consider what construction the courts have given to these several requirements.

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A debt or money demand within the competence of the Division Section Court .- The words "debt or money demand" are those used in section 70, sub-section (c) and in section 109. In the notes to those sections, the meaning of the phrase has already been fully discussed; it will not be necessary, therefore, to enter into any discussion of it here.

Claims strictly for damages .- The following causes of action would come within the meaning of the language here used, and would not be the subject of garnishee proceedings before judgment: Actions for trespass or trover: see Shaw v. Shaw, 18 L. T. N. S. 420; for breach of warranty of chattels; Northwood v. Rennie, 28 C. P. 202; 3 A. R. 37; against an attorney for negligence: Robinson v. Emanuel, L. R. 9 C. P. 415; or for compromising an action against the express direction of his client: Butler v. Knight, L. R. 2 Ex. 109; for wrongful dismissal of a servant; Hartland v. General Exch. Bank, 14 L. T. N. S. 863, per Willes, J.; for not accepting goods sold: Boorman v. Nash, 9 B. & C. 145; for not delivering goods: Brown v. Muller, L. R. 7 Ex. 319; for not accepting stock sold: Pott v. Flather, 16 L. J. Q. B. 366; against a public carrier for negligence: Simpson v. London & N. W. Ry. Co., 1 Q. B. D. 274; for breach of covenant to repair: Henderson v. Squire, L. R. 4 Q. B. 170; on a bond to do something besides the mere payment of a sum certain in money: Branscombe v. Scarbrough, 6 Q. B. 13; or on a replevin bond: 1b.: for negligent driving of carriages or trains causing damage: Readhead v. Mid. Ry. Co., L. R. 4 Q. B. 379; for injuries to workmen; Smith v. Baker, (1891), A. C. 225; for deceit: Swift v. Jewsbury, L. R. 9 Q. B. 301; Derry v. Peek, 14 App. Cas. 337; for excessive distress: Fell v. Whittaker, L. R. 7 Q. B. 120-124; for irregular distress: Knight v. Egerton, 7 Ex. 407; for an illegal distress: Attack v. Bramwell, 3 B. & S. 520; or when no rent due: 1b.; in detinue: Wiley v. Crawford, 1 B. & S. 253; or replevin: Gibbs v. Cruickshank, L. R. 8 C. P. 454; against a sheriff or bailiff for wrongfully seizing goods: Mayhew v. Herrick, 7 C. B. 229; or for not arresting: Williams v. Mostyn, 4 M. & W. 145; or for allowing a person to escape: Macrae v. Clarke, L. R. 1 C. P. 403; or for not levying, or a false return: Hobson v. Thelluson, L. R. 2 Q. B. 642; on any contract of indemnity: Theobald v. Ry. Passengers Ass. Co., 10 Ex. 45; for injuries resulting from the negligent keeping of animals: Ellis v. Loftus Iron Co., L. R. 10 C. P. 10; for assault and battery and false imprisonment: Warwick v. Foulkes, 12 M. & W. 507; by principal against his agent for negligence: Parker v. McKenna, L. R. 10 Ch. 90; for non-delivery of telegraphic messages: Sanders v. Stuart, 1 C. P. D. 326; or for hegligence in transmitting same: Dickson v. Reuter's Tel. Co., 2 C. P. D. 62; or in an action against a witness for non-attendance on subpœna: Yeatman v. Demsey, 7 C. B. N. S. 628.

The debt.—The debt of the primary debtor must be due and owing. While that of the garnishee need only be due or owing. The case of Johnson v. Diamond, 11 Ex. 73, well illustrates the principle of what is a "debt" within the phrase "debt or money demand," namely a liquidated money obligation for which, speaking generally, an action will lie:

4ee Webster v. Webster, 31 Beav. 393; but which obligation may be either legal or equitable: per Lindley, L.J., Webb v. Stenton, 11 Q. B. D. 518; Legarie v. Canada Loan & Banking Co., 11 P. R. 512. "Due" may mean either owing or payable, and what it means is determined by the context: Ex parte Kemp, L. R. 9 Ch. 383; Re Stockton Malleable Iron Co., 2 Ch. D. 101. The word "due" in the Act is used in the same sense as payable: see section 204, where the words are "owing to the primary debtor, whether due or not due." Money may then be said to be due at the expiration of the credit given, or at the period promised: Webster. To be "due and owing," therefore, the primary debtor must not only be indebted, but the debt must be payable: i.e., past due, while to be "due or owing"

Section 173 it is only necessary that there should be a debt contracted though not payable until a future time. There need not be a present right to sustain an action against the garnishee: Parker v. Howe, 12 P. R. 353. Section 194 provides, however, that no execution shall issue against the garnishee until and so far only as the debt has become fully due. Judgment may, however, be given against the garnishee at the hearing, suspending the issue of execution until the money becomes due: Tapp v. Jones, L. R. 10 Q. B. 592, 593. The mere possibility that when the day for payment arrives there may be a defence against the recovery of the debt is no ground for resisting judgment: Sparks v. Young, S. Ir. C. L., R. 251. The rule of the Ont. Jud. Act (C. R. 935), which makes provision for the attachment of claims and demands, not being debts, but such interest as could formerly have been made available under equitable execution, does not apply to Division Courts: Simpson v. Chase, 14 P. R. 280; see notes to section 73.

Where the garnishees are co-partners the names of the individual members of the firm must be set out in the process. A garnishee sumnnons against the firm of "A. B. & Co.," is not authorized by section 10%, sub-section 4: Walker v. Rooke, 6 Q. B. D. 631; Reid v. McLeod, 20 Ala. 576; and where a garnishee is not indebted in his individual capacity but is a partner in a firm, it was held, he could not be charged without his partners being made parties to the proceeding: Rix v. Elliott, 1 N. H. 184; see also Parker v. Danforth, 16 Mass. 299; but in Clarke v. Macdonald, 4 O. R. 310, it was said, that judgment could not in any event be given except against the partners served. As each partner is jointly liable for the debt, it is an open question whether a partner served with process in which his firm was described as garnishees, would not be sufficiently charged, in the absence of objection by him to the summons as irregular: King v. Hoare, 13 M. & W. 494; Kendall v. Hamilton, 4 App. Cas. 504. Where a judgment creditor has induced his debtor to assign his book debts to him he cannot proceed against the debtors summarily by garnishment proceedings: Armstrong v. Douglas, 8 C. L. T. 49.

Debts attachable.—A fair test of a debt being garnishable is whether or not it could be the subject of set-off: Johnson v. Diamond, 11 Ex. 263; Webster v. Webster, 31 Beav. 393; McNaughton v. Webster, 6 U. C. L. J. 17; McPherson v. Tisdale. 11 P. R. 261; Parker v. Howe, 12 P. R. 351. Generally speaking, "money in the hands of a man who cannot refuse to pay it somehow or another is a 'debt,' and if so, it can be attachable:" per Coleridge, C.J., Booth v. Trail, 12 Q. B. D. 8. If a debt is attachable the recovery of judgment does not make it less so: McKay v. Tait, 11 C. P. 72. A debt due for which a cheque has been given may be attached, but if the garnishees do not stop payment of the cheque, no order for payment will be made: Cohen v. Hale, 3 Q. B. D. 371; Elwell v. Jackson, 1 C. & E. 362. Money deposited with the garnishee for a special purpose, which has failed, remains in his hands in trust and is garnishable: Stumore v. Campbell, (1892), 1 Q. B. 314.

All "debts," whether legal or equitable, owing to the judgment debtor, whether presently payable or not, are garnishable: but only "debts" can be attached, and moneys which may or may not become payable from a trustee to his cestui que trust, are not debts: Webb v. Stenton, 11 Q. B. D. 518, 528; Stuart v. Grough, 15 A. R. 299. A trustee is not an equitable debtor until there is money in hand which he ought to pay to the cestui que trust, or until he has made himself personally liable to pay money to the cestui que trust, by reason of some breach of trust or default in the performance of his duties: per Fry, L.J. 11 Q. B. D. 530.

The mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him as executor to the judgment creditor: Tiffany v. Bullen, 18 C. P. 91; Burton v. Roberts, 6 H. & N.

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and for not e judgment 6 H. & N. 93; Fowler v. Roberts, 2 Giff. 226, but the order in such cases should section shew on its face that it is directed to the executor as such: Stevens v. Phelips, L. R. 10 Ch. 417.

But a debt due to an administrator, as such, cannot be attached to answer his private debt; Bowman v. Bowman, 1 Ch. Cham. 172.

Though a primary debtor may have taken the garnishee in execution for the debt, it is, nevertheless, attachable: Marples v. Hartley, 1 B. & S. 1.

Rent which is accrued by virtue of the Apportionment Act of Ontario may be attached and may be ordered to be paid when due to satisfy the primary debt: R. S. O. c. 143, ss. 2, 3; Patterson v. Richmond, 17 L. J. N. S. 324; Massie v. Toronto Ptg. Co., 12 P. R. 12; but is doubtful whether rent could be gumshed as against a mortgagee of the landlord: Ib.; but see Jones v. Thompson, 27 L. J. Q. B. 234, and other cases cited infra, p. 249.

There appears to be nothing to prevent money in the hands of an agent in this province, being garnished where the garnishee resides out of the Province: Brown v. Merrills, 3 U. C. L. J. 31. In this respect the Division Courts have an anomalous jurisdiction over foreigners. The High Court and County Courts cannot reach, by garnishee process, a corporation, firm or individual, resident out of the jurisdiction: C. R. 935; Canada Cotton Co. v. Parmalee, 13 P. R. 308.

A judgment or order for costs only is sufficient to sustain garnishee process: Elliott v. Capell, 9 P. R. 35; Re Irvine, 12 P. R. 297; see also Nott v. Sands, W. N. (1883), 74; Sunderland Local Marine Bd. v. Frankland, L. R. 8 Q. B. 18; Cremetti v. Crom, 4 Q. B. D. 225; C. R. 934.

It has been held that the following are debts and are attachable:— The over-due superannuation of a retired police constable: Booth v. Trail, 12 Q. B. D. 8; Murphy v. Green, 26 L. R. Ir. 610; see also Shanley v. Moore, 9 U. C. L. J. 264: Hall v. Pritchett, 3 Q. B. D. 215; the superannuation of a County Judge; Willcock v. Terrell, 3 Ex. D. 323; or civil servant: Sansom v. Sansom, 4 P. D. 69; a commutation of a pension: Crowe v. Price, 22 Q. B. D. 429; see also Re Webber, 18 Q. B. D. 111; over-due rent: Mitchell v. Lee, L. R. 2 Q. B. 259.

A balance due for purchase money of leaseholds, after assignment to the purchaser, and entry into possession by him: Owens v. Shield, 1 C. & E. 356: an ascertained amount due on a guarantee: Bouch v. Sevenoaks, etc., Ry. Co., 4 Ex. D. 138; dividends, though not declared on an insolvent estate: Parker v. Howe, 12 P. R. 351; an amount certain payable under a bond: Johnson v. Diamond, 11 Ex. 73, per Parke, B., at p. 80; money in the hands of bankers; Re United Eng. and Scot. Ins. Co. L. R. 5 Eq. 300; Miller v. Huddlestone, 22 Ch. D. 233; Rogers v. Whitely, 23 Q. B. D. 236; (1892), A. C. 118; the proceeds of an execution in the sheriff's hands for a debt due by the executon creditor: Murray v. Simpson, 8 Ir. C. L. R. App. xlv; In re Smart v. Miller, 3 P. R. 385; O'Neill v. Cunningham, 6 Ir. L. R. 503; Williams v. Reeves, 12 Ir. Ch. R. 173; a debt due to one or more of the judgment debtors upon a judgment recovered against several, may be attached in the hands of the garnishee: Miller v. Mynn, 1 E. & E. 1075; money in the hands of a corporation or company: Salaman v. Donovan, 10 Ir. C. L. R., Ap. xiii; or of a Division Court Clerk: Bland v. Andrews, 45 U. C. R. 431; but the contrary has been held in England: see Dolphin v. Layton, 4 C. P. D. 130; Howell v. Metrop. Dist. Ry. Co., 19 Ch. D. 508; or of a Division Court Bailiff: Lockart v. Gray, 2 L. J. N. S. 163; a debt due to a testator's estate on a judgment against his executors as such: Fowler v. Roberts, 2 Giff, 226; Burton v. Roberts, 6 H. & N. 93; money payable for work done for a municipal corporation: Alden v. Boomer, 2 P. R. 339; money due under an award and decree of the Court of Chancery,

Section 173

although the full amount was not ascertained by reason of the costs not having been taxed: In re Sato v. Hubbard, 8 P. R. 445; costs coming to plaintiff though not yet taxed: McPherson v. Tisdale, 11 P. R. 261; or a sum to be ascertained as due to the holder of a Mechanics' Lien: Re Withrow, 19 L. J. N. S. 114; an annuity in the hands of trustees in whom it was vested was held attachable in Nash v. Pease, 47 L. J. Q. B. 766; and money in the hands of a trustee though not as yet due to the cestui que trust, in Lloyd v. Wallace, 9 P. R. 335; but these cases cannot now be considered as authorities: Webb v. Stenton, 11 Q. B. D. 518; Stuart v. Grough, 15 A. R. 299: money lodged in court in the name of the Master of the court was held to be the subject of a charging order: Adams v. Gillem, 9 Ir. C. L. R. 148; unnegotiable promissory notes, being in the same position as ordinary choses in action, are the subject of garnishment: Oldham v. Ledbetter, 1 Howard (Miss) 43; Wilhelmi v. Hafner, 52 Ill. 222; Colvin v. Rich, 3 Porter, 175; money in the hands of a receiver may be attached with the leave of the court which appointed him: De Winton v. Brecon, 28 Beav. 200; a debt due by a company in liquidation under the Winding up Act to a primary debtor might be reached by garnishment, and the primary creditor would then be entitled to the dividend of the debtor: Prichard's claim, 2 D. F. & J. 354; see, however, Hunter v. Greensill, L. R. S C. P. 24; Mack v. Ward, W. N. (1884), 16. The process should apparently be issued against the company after obtaining the leave of the court in which the winding up was being carried on; R. S. C. c. 129, s. 16.

An overdue negotiable note may be attached: Roblin v. Rankin 11 S. C. R. 137.

A receiver may be appointed of the interest of a husband in lands of wife dying intestate: Harris v. Harper, 9 C. L. T. 39. Where a receiver was appointed, by way of equitable execution, to receive a pension, the court ordered that a certain sum should be applied on the judgment out of each payment and the residue paid to the debtor, thus providing for his maintenance: Molony v. Cruise, 30 L. R. Ir. 99.

Claims not attachable.—The following have been held not to be debts within the meaning of the statute, and therefore not attachable. Damages, though after verdict, until judgment obtained: Jones v. Thompson, 27 L. J. Q. B. 234; a verdict on a marine policy: Dresser v. Johns, 6 C. B. N. S. 429; a verdict obtained in default of delivery of a chattel; In re Scarth, L. R. 10 Ch. 234; but a verdict is now attachable before judgment: Holtby v. Hodgson, 24 Q. B. D. 103; Davidson v. Taylor, 14 P. R. 78; an unascertained claim on a fire policy: Boyd v. Haynes, 5 P. R. 15; Tate v. Corp. of Toronto, 3 P. R. 181; Randall v. Lithgow, 12 Q. B. D. 525; Bank of Toronto v. Burton, 4 P. R. 56; Gwynne v. Rees, 2 P. R. 282; Simpson v. Chase, 14 P. R. 280; and even though the amount may have been adjusted, it is not attachable; as the adjustment has not the effect of determining absolutely the amount due: Simpson v. Chase, 14 P. R. 280; it would be sufficient if the amount had been fixed by an award: Victoria Mutual v. Bethune, 1 A. R. 398; money due to Poor Law Guardians primarily applicable to the relief of the poor though they had become indebted in their official capacity for goods supplied: Murphy v. Guardians Belmullet Union, 22 L. R. Ir. 215; money in the hands of a County Court Registrar: Dolphin v. Layton, 4 C. P. D. 130 (but see ante pp. 246-248); money paid into the hands of a Deputy Clerk of the Crown, Clerk of the County Court or Division Court: Ib.; or of a Clerk of the Peace: Darcy v. Carragher, 18 L. R. Ir. 317; or of the Police; Jervis v. Peel, 1 T. L. R. 306; Bice v. Jarvis, 49 J. P. 264; Re Baird v. Nolan, 20 O. R. 311; but in Field v. Rice, 20 O. R. 309, it has been held by the Q. B. Divisional Court, that the question whether money taken by the police, from a prisoner

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A contract to loan money creates no debt, and even though the judgment debtor may have mortgaged his property to the garnishee for the amount of a proposed loan, no attachable debt would thereby exist: Western Wagon & Property Co. v. West, (1892), 1 Ch. 271.

Moneys in the hands of a trustee in bankruptcy have been held to be not attachable: Boys v. Simpson, 8 Ir. C. L. R. 523; Hunter v. Greensill, L. R. 8 C. P. 24; Prout v. Gregory, 24 Q. B. D. 281; or of a liquidator: Mack v. Ward, W. N. (1884), 16; or of the mortgagee as the surplus of a sale of mortgaged property when sold by a prior mortgagee under his power of sale, the sale having taken place after the service of the garnishee order: Chatterton v. Watney, 16 Ch. D. 378, in appeal, 17 Ch. D. 259; (but the holder of a garnishee order, served after the sale, is entitled to attach the surplus proceeds of sale in the hands of the first mortgagee, Ib.; Re Mead & Creary, 32 C. P. 1); claims for misrepresentation; Roberts v. Corp. of Toronto, 16 Gr. 236; an unascertained amount claimable under a bond: Johnson v. Diamond, 11 Ex. 73; a legacy in the hands of an executor, even though he promised to pay it if ordered to do so: McDonald v. Hollister, 3 W. R. 522; unless there has been such an account stated by the executor as would entitle the legatee to sue at law: Ib.; dividends payable to the wife of the execution debtor: Dingley v. Robinson, 2 Jur. N. S. 1145; moneys payable on a contingency, as for purchase money before execution of conveyance: Howell v. Metrop, Dist. Ry. Co., 19 Ch. D. 508; or for purchase money prior to the completion of expropriation proceedings: Richardson v. Elmit, 2 C. P. D. 9; Fellows v. Thornton, 14 Q. B. D. 335; Nash v. Pease, 47 L. J. Q. B. 766; Lloyd v. Wallace. 9 P. R. 335; rent or instalments of rent not yet due: Jones v. Thompson, 27 L. J. Q. B. 234; Commercial Bank v. Jarvis, 5 U. C. L. J. 66; McLean v. Sudworth, 4 U. C. L. J. 233; (but see Patterson v. Richmond, 17 L. J. N. S. 324; Massie v. Toronto Ptg. Co., 12 P. R. 12); trust income not yet come to the hands of trustees, although when received it would be payable to the debtor: Webb v. Stenton, 11 Q. B. D. 518; salary or pension not yet payable: Hall v. Pritchett, 3 Q. B. D. 215; Booth v. Trail, 12 Q. B. D. 8; Shanley v. Moore, 9 U. C. L. J. 264; Trust & Loan Co. v. Gorsline, 12 P. R. 654: the half pay of an army officer: Birch v. Birch, 8 P. D. 163; Lucas v. Harris, 18 Q. B. D. 127; the pay of a surgeon in Her Majesty's Navy on active service: Apthorpe v. Apthorpe, 12 P. D. 192. (Half-pay is given to a man in order to keep him in a state to perform his duties, if called upon to discharge them, and pay is given him to enable him to discharge his duties in presenti. Neither can be assigned, and not being assignable are not attachable: Flarty v. Odlum, 3 T. R. 681; Apthorpe v. Apthorpe, 12 P. D. 193; Brenan v. Morrisey, 26 L. R. Ir. 618); an annual gratuity from the East India Co.: Innes v. East India Co., 17 C. B. 351; moneys held for and not yet payable to a married woman who is restrained from anticipation: Chapman v. Biggs, 11 Q. B. D. 27; Galmoye v. Cowan, 58 L. J. Ch. 769; see Stanley v. Stanley, 7 Ch. D. 589; Macdonald v. Anderson; 9 C. L. T. 158. Where trustees have a direction to apply the whole or any part of income for the benefit of a judgment debtor, there is no attachable debt: R. v. Lincolnshire (Judge), 20 Q. B. D. 167; annuities or instalments of annuities not yet due: Nash v. Pease, 47 L. J. Q. B. 766; or interim or permanent alimony: Re Robinson, 27 Ch. D. 160.

It was held that money in the sheriff's hands, levied under an attachment for costs awarded by a decree in equity, remained in custodia legis, and was not, without further order, the property of the party who issued the attachment: Williams v. Reeves, 12 Ir. Ch. R. 173; money paid into

Section 173 court: Jones v. Brown, 29 L. T. Rep. 79; French v. Lewis, 16 U. C. R. 547; unsettled balance by one partner to another: Campbell v. Peden, 3 U. C. L. J. 68; but if ascertained it can: Ib.; money sent by a father to his son as a gift, through a bank was held not to be a debt due by the bank to the son while the father retained power to withdraw the gift: Caisse v. Tharp, 5 P. R. 265; money alleged to be due on an indemnity bond, the same not being capable of being set-off: Griswold v. Buffalo B. & G. Ry. Co., 2 P. R. 178; wages or salary of servants to the extent of \$25: see section 174; nor the salary of a municipal officer who holds his office at the will of the corporation at a yearly salary, payable quarterly, until some part of it is overdue: Shanley v. Moore, 9 U. C. L. J. 264, and cases cited ante pp. 248-249; nor a juror's allowance in the hands of the county treasurer: Phillips v. Austin, 3 C. L. T. 316; where a fund is applicable to the payment of several persons, pari passu, one of them cannot take garnishment proceedings and thus obtain priority over the others: Kennett v. Westminster Improvement Comm'rs. 11 Ex. 349; nor money in the hands of the sheriff arising from a sale of land for taxes, at the instance of creditors of the county corporation: Wilson v. Corp. of Huron and Bruce, 8 U. C. L. J. 136; nor the redemption moneys paid to the county treasurer by owners of land sold for taxes and banked in the name of the treasurer: S. C. 8 U. C. L. J. 135; nor surplus moneys, if any, after payment of the debts of A., which by the terms of a trust deed might be paid to the debtor or invested in land to be conveyed to him: McKindsey v. Armstrong, 10 A. R. 17; nor a debt due by the garnishee to a person who would be a trustee of it for the judgment debtor; Boyd v. Haynes, 5 P. R. 15; (but such a debt would be held now to be garnishable: Wilson v. Dundas, W. N. (1875), 232; Summers v. Morphew, 61 L. T. Jour. 140; Webb v. Stenton, 11 Q. B. D. 518; Learning v. Woon, 7 A. R. 42); nor can money which may become due if the terms of a contract are performed be attached even though some work may have been done: McCraney v. McLeod, 10 P. R. 539; and though, if the contractor abandons the contract, and the contractee enter upon the work and complete it, a debt may arise by implication for the value of the work done, a garnishee summons served before the contractee entered upon the work will not attach such amount : McCraney v. McLeod, 10 P. R. 539, explained in Parker v. Howe, 12 P. R. 351; nor a negotiable promissory note not yet due: Jackson v. Cassidy, 2 O. R. 521; Pyne v. Kinna, 11 Ir. R. C. L. 40; Mellish v. Buffalo B. & G. Ry. Co., 2 U. C. L. J. 230; 14 L. J. N. S. 256.

Neither our Dominion nor Provincial Governments can be made garnishees, unless so declared by proper statutory authority: R. v. Mc-Farlane, 7 S. C. R. 216; Apthorpe v. Apthorpe, 12 P. D. 192; Gidley v. Palmerston (Lord) 3 B. &. B. 275; Macbeath v. Haldimand, 1 T. R. 172. Money upon which the garnishee has a lien cannot be taken from him without such lien being first discharged: Nolan v. Crook, 5 Humphreys, 312: Smith v. Clarke, 9 Iowa, 241; Grant v. Shaw, 16 Mass. 341; Curtis v. Norris, 8 Pick. 280; Goddard v. Hapgood, 25 Vt. 181; Nathans v. Giles, 5 Taunt. 558; Stumore v. Campbell, (1892), 1 Q. B. 314. A liability cannot be enforced against the garnishee for a debt based on an illegal consideration: McGlinchy v. Winchell, 63 Maine, 31.

The County Treasurer cannot be garnished on a judgment against the Clerk of the Peace for that County for moneys which may come into the hands of such County Treasurer for said Clerk of the Peace, after the Board of Audit has passed upon his accounts, the same not being a garnishable debt: In re Hanvey v. Stanton, 13 L. J. N. S. 103; Palmer v. Bate, 2 Brod. & Bing. 673.

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Where a claim is for unliquidated damages, and is referred to arbitrators there can be no garnishment until after award: Tate v. Corp. of Toronto, 10 U. C. L. J. 66. Where a cheque was given and duly paid, it was held there was no debt between the time of giving it and the time of payment, and no duty upon the drawer of the cheque to stop payment on being served with a garnishee order: Elwell v. Jackson, 1 C. & E. 362; but if the cheque had been stopped, the debt would have been attachable: Cohen v. Hale, 8 Q. B. D. 371. Officers of the law, whose duty it is to hold moneys for suitors, have, in the United States, been generally held exempt from garnishee process: Staples v. Staples, 4 Maine, 532; Thayer v. Sherman, 12 Mass. 441; Riley v. Hirst, 2 Penn. 346. A debt owing to two cannot be attached to satisfy a claim against only one of these two: Re Smart v. Miller, 3 P. R. 385; McCormack v. Park, 9 C. P. 330; Macdonald v. Tacquah Gold Mine Co., 13 Q. B. D. 537. A life interest of a tenant by the curtesy, in purchase money, is not attachable: Palmer v. Lovett, 14 P. R. 415.

Rights of other parties.—Only such property can be attached as the debtor could deal with properly and without violating the rights of other persons at the time the garnishee order is served: Westoby v. Day, 2 E. & E. 605; Badeley v. Consolidated Bank, 34 Ch. D. 536; s. c. 38 Ch. D. 238; ReGeneral Horticultural Co., 32 Ch. D. 512; Vysev. Brown, 13 Q. B. D. 199; Armstrong v. Douglas, 8 C. L. T. 49; Davis v. Freethy, 24 Q. B. D. 519; Beaty v. Hackett, 14 P. R. 395. An assignment in insolvency prevented garnishment: Re Fair v. Bell, 2 A. R. 632. An order upon a garnishee has no operation upon debts of which a judgment debtor has already divested himself by bona fide assignment: Hirsch v. Coates, 18 C. B. 757; Ferguson v. Carman, 26 U. C. R. 26; Macaulay v. Rumball, 19 C. P. 284; and when a verdict was assigned with a covenant for further assurance, and the verdict was set aside, but on a new trial a similar verdict was rendered, it was held, that the assignment covered the second verdict, and had priority over a garnishee order on the amount of the second verdict: Davis v. Freethy, 24 Q. B. D. 519. And to make an assignment of a debt prevail over an attaching order it is not necessary that notice of the assignment should be given to the garnishee: Brown v. McGuffin, 5 P. R. 231, and cases there cited; Robinson v. Nesbitt, L. R. S. C. P. 264; Grant v. McDonell, 39 U. C. R. 412. A person must be made a party to garnishee proceedings before his right can be affected thereby: Re Fair v. Bell, 2 A. R. 632; see Turnbull v. Robertson, 38 L. T. N. S. 389.

Where a tenant by the curtesy joined in a conveyance of land to a purchaser, but had never obtained any interest in the land or purchase money, it was held that no debt legal or equitable was due to him by the solicitor for the heir, who had received the purchase money: Palmer v. Lovett, 14 P. R. 415. Bond holders of a railway company, whose bonds are a first charge upon the undertaking have no right to earnings of the road while operated by the company, as against an attaching creditor. Their remedy is the appointment of a Receiver: Phelps v. St. Catharines & Niagara Central Ry. Co., 19 O. R. 501.

Where a Receiver is appointed of a debt, an attachment, after the appointment, without leave, would be a contempt: Searle v. Choat, 25 Ch. D. 723; and if the Receiver should be appointed after the attachment, the garnishee would not be justified in paying the money to the attaching creditor without the leave of the court which appointed the Receiver:

Section 173 Hawkins v. Gethercale, 1 Drew. 12; Ames v. Birkenhead Dock Co., 20
 Beav. 332; Stuart v. Grough, 15 A. R. 299.

Where the assignee of a debt not only neglected to give notice of assignment, but his solicitor stood by while an attaching order was being made, and the garnishee paid the debt to the judgment oreditor, the court relieved the garnishee from an order made against him prior to the garnishment under which he was liable to attachment: In re Jones. Ex parte Kelly, 7 C. P. 149.

Where it is clear, upon the facts appearing in support of the claim of the primary oreditor against the garnishee, that the moneys sought to be garnished do not belong to the judgment debtor, but to a third person, such third person should not be summoned to prove his claim but the garnishee summons should be dismissed; Johnson v. Moody, 12 P. R. 203; but it would be otherwise if the primary creditor could suggest a plausible ground for supposing the money to be that of the judgment debtor, or cast any doubt upon the bona fides of the third party's claim: Ib.

A solicitor, by whose efforts a judgment is recovered, has a lien thereon for the costs of the action in which it was recovered, which will have priority over a garnishee summons issued at the instance of a creditor of the client; Canadian Bank of Commerce v. Crouch. 8 P. R. 437; The Jeff. Davis, L. R. 2 A. & E. 1; Cormick v. Ronayne, 22 L. R. Ir. 140; Shippey v. Grey, 42 L. T. N. S. 673; but per Lord Watson in North v. Stewart, 15 App. Cas. 463, "in the courts of common law, a solicitor's lien upon costs decreed does not prevent their attachment by other persons having claims against the judgment creditor: see In re Knight. Knight v. Gardner, (1892), 2 Ch. 370.

Distinct notice of the lien must be given to the garnishee, who will then be bound to bring it to the notice of the court, and the solicitor will then be summoned under section 197. If the garnishee should not have notice, and the money should, therefore, be paid to the judgment creditor, he would be compelled to repay it if he had notice of the lien at the time of receiving the money: Eisdell v. Conningham, 28 L. J. Ex. 213: s. c. 4 H. & N. 871; Hough v. Edwards, 1 H. & N. 171; Mercer v. Graves, L. R. 7 Q. B. 499; Davidson v. Douglas, 15 Gr. 347; R. v. Benson, 2 P. R. 350; Bank of Upper Canada v. Wallace, 2 P. R. 352; Cotton v. Vansittart, 6 P. R. 96; Hamer v. Giles, 11 Ch. D. 942; Dallow v. Garrold, 14 Q. F. D. 543. If judgment has been given against the garnishee, and it subsequently appears that the debt was assigned prior to the garnishment, the judgment will be set aside: Beaty v. Hackett, 14 P. R. 395, notwithstanding more than 14 days may have elapsed: McLean v. McLeod, 5 P. R. 467.

Where, in garnishee proceedings, the money is trust money, or there is reasonable suspicion that it is trust money, the cestui qui trust has a right under equitable procedure to come forward, provided he does so in time, and object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act: Roberts v. Death, 18 L. J. N. S. 101; 8 Q. B. D. 319.

Money deposited by a stock broker in his own name, but belonging to clients, is not attachable: Hancock v. Smith, 41 Ch. D. 456.

The proceedings in garnishment can have no effect to overthrow trusts in order to reach moneys supposed to belong to a debtor. Such moneys must be the property of the debtor absolutely: White v. White, 30 Vermont, 338; Keyser v. Mitchell, 67 Penn. 473.

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174. No debt due or accruing to a mechanic, workman, Sections 174-175 labourer, servant, clerk, or employee, for, or in respect of, Debts due his wages or salary, shall be liable to seizure or attach-for wages not to be ment under this Act, or any other Act relating to the attached, except as attachment or garnishment of debts, unless the debt ex- to excess over \$25. ceeds the sum of \$25, and then only to the extent of the R. S. O. 1877, c. 47, s. 125; c. 50, s. 318. excess.

Workman, laborer, etc.—A medical health officer of a city is not an employee: In re Macfie v. Hutchinson, 12 P. R. 167; see also Forsyth v. Canniff, 20 O. R. 478; and a secretary of a company on a salary of £200 a year, was held not to be a servant within the meaning of the English Act: Gordon v. Jennings, 9 Q. B. D. 45; see Lea v. Parker, 13 Q. B. D. 835. But he would probably be an employee.

Wages or Salary.—The language of this section is much wider in its scope and object than the provisions of the English Act which only affects the "wages" of any "servant, labourer or workman," while under this provision the "wages or salary" of any mechanic, workman, labourer, servant, clerk or employee" to the extent of \$25 is protected and exempt from garnishee proceedings subject to the provisions of the next succeeding sections. A case can hardly be conceived where the relation of employee and employer exists to which this section would not apply. The word "employee" alone, independently of the other classes of persons mentioned, shows how extensive its provisions are. It was held that a person who at a post-master's request gratuitously assisted him in sorting letters was within the phrase "person employed under the Post-Office:" per Park B., R. v. Reason, 23 L. J. M. C. 13. And the word "employee" means "a person employed:" Worcester: see Gurney v. Atlantic, &c., Ry. Co., 2 N. Y. Supr. Ct. 453. It has been contended that where a mechanic works by the piece and not by the day this clause does not apply. It is submitted that the section has application as much in the one case as in the other; that work performed either one way or the other should be considered "wages" within the meaning of the section. The word "wages" would seem to apply to the personal earnings of labourers and artizans: see Gordon v. Jennings, 9 Q. B. D. 45; Riley v. Warden, 2 Ex. 59; Sleeman v. Barrett, 2 H. & C. 934; Ingram v. Barnes, 7 E. & B. 132; In re Jones. Ex parte Lloyd; (1891), 2 Q. B. 231. It has been said that "according to the most approved lexicographers 'salary' and 'wages' are synonymous. Both mean 'a sum of money periodically paid for services rendered.' If there is any difference in the popular sense, it is in the application to more or less honourable services:" per Sharswood, C.J., Commonwealth, ex rel Wolfe v. Butler, 99 Pa. 542, see Stroud, 696, 870. The earnings of a commercial traveller, whose employment is at so much a year, terminable by a week's notice, are "salary:" Ex parte Brindley, 35 W. R. 596.

We think that when a garnishee makes a defence, or admission, under section 188 of this Act, he should, if the debt is for wages or salary, shew whether the amount is or is not subject to the exemption mentioned in this section. See also Apthorpe v. Apthorpe, 12 P. D. 192.

175. Nothing in the next preceding section contained Saving shall apply to any case where the debt has been contracted to certain debts. for board or lodging, and in the opinion of the Judge, the

extension exemption of \$25 is not necessary for the support and maintenance of the debtor's family. R. S. O. 1877, c. 47, s. 126; 47 V. c. 9, s. 1; c. 50, s. 319. [Or where the debtor is an unmarried person having no family depending on him for support.] 52 V. c. 12, s. 23.

Board or lodging.—The word "board" means "food, diet, provision." "The customary meals obtained for a stipulated sum at the table of another; as, he pays a high price for his board;" Worcester: and the verb "to board" is defined by the same author as "to live in a house at a certain rate for eating; to be furnished with food or meals for a stipulated sum." It would not be necessary to constitute a debt for board under this section that there should be any stipulated sum. A person boarding with another would impliedly be responsible to the latter for what such board might reasonably be worth. The law would imply a contract to pay for it, unless it appeared that it was given gratuitously, and not with the intention of being charged for.

A "lodger," generally speaking, "is a person whose occupation is part of a house, and subordinate to, and in some degree under the control of a landlord or his representative, who either resides in or retains the possession of or dominion over the house generally, or over the cuter door, and under such circumstances that the possession of any particular part of the house held by the lodger does not prevent the house being in the possession of the landlord:" "It is always important in determining whether a man is a lodger to see whether the owner of the house retains his character of master of the house, and whether he occupies a part of it by himself or his servants, and at the same time retains the general control and dominion over the whole house, and this he may do though he do not personally reside on the premises:" per Bovill, C.J., Thompson v. Ward L. R. 6 C. P. 360, 361.

See also Ancketill v. Baylis, 10 Q. B. D. 577; Bradley v. Baylis, 8 Q. B. D. 195; Hogan v. Sterrett, 20 L. R. Ir. 344; Phillips v. Henson, 8 C. P. D. 26; the judgment of Brett, J., Morton v. Palmer, 51 L. J. Q. B. 7; 9 Q. B. D. 89; Toms v. Luckett, 5 C. B. 23; Smith v. Lancaster, L. R. 5 C. P. 251. The rooms may be unfurnished; Allan v. Liverpool, L. R. 9 Q. B. 180; and see, also, Ness v. Stephenson, 9 Q. B. D. 245.

It is not necessary that the board or lodgings should be supplied by one who holds himself out as a boarding-house keeper or lodging-house keeper. Any person who boards or lodges another for reward would be within this section; so also would his assignee of the debt.

In the opinion of the Judge.—"In the opinion of the Judge" means according the judgment of the Judge; Ormerod v. Todmorden Co., 8 Q. B. D. 664. See also R. v. London (Bishop), 24 Q. B. D. 213; Julius v. Oxford (Bishop), 5 App. Cas. 214.

Sir Peter Maxwell in his work on the interpretation of statutes at pages 100 and 101 says: "Where, as in a multitude of acts, something is left to be done according to the discretion of justices or other authorities on whom the power of doing it is conferred, the discretion must be exercised lonestly and in the spirit of the Act, otherwise the act done would not fall within the statute. 'According to his discretion' means, it is said, according to the rules of reason and justice, not private opinion, according to law and not humour; it is not to be arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself, that is within the limits and for the objects

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statutes at s, something her authoriion must be he act done tion' means, vate opinion, v, vague and within the of his office the objects intended by the legislature." See also Macbeth v. Ashley, L. R. 2 Scotch Section App. 352, per Cairns, L.C., Julius v. Oxford (Bishop), supra, and other cases cited in note on the word "may" and other enabling words,

ante p. 241.

Necessary for the support, etc., of the debtor's family.—The Judge by such evidence as may be brought before him or as he may require, will have to determine whether under the circumstances the \$25 is "necessary" or not. The language used is of that class which, it is unnecessary to define; its construction depending upon the particular circumstances of each particular case. See Johnson v. Crook, 12 Ch. D. 639; Webster v. Overseers of Ashton-under-Lyne, L. R. 8 C. P. 281, 306; Gladstone v. Padwick, L. R. 6 Ex. 203; In re Duke of Newcastle, L. R. 8 Eq. 700; Hatton v. Haywood, L. R. 9 Ch. 229; Whimsell v. Giffard, 8 O. R. 1.

It is submitted that a broad and liberal interpretation should be given to the language used. The word "support" is defined as, "to furnish with the means of living, as a family; to provide for, to maintain, to supply," and maintenance means, "supply of the necessaries of life, sustenance, subsistence, livelihood, support:" Worcester.

Education is included in the phrase "Maintenance and support," as applied to children: Re Breed, 1 Ch. D. 226. It may, therefore, be stated, in a general way, that in determining whether the exemption is "necessary" or not, the health of the debtor, his age and ability to work, the number of his family, their age and sex and state of health, and also their ability to work, whether they or the debtor have employment, and other circumstances may be fit subject of enquiry; and if the \$25 should be considered by the Judge, in view of all the circumstances of the case, to be necessary for the purpose of obtaining the necessaries of life and sustaining in an ordinary way the debtor's family, then the exemption should be allowed.

The word "family" might here mean the wife and children only of the debtor; but it is submitted that the construction to be given to it should not be of so restricted a character. The word has a variety of meanings and is controlled by the context. The primary legal meaning is "children:" per Jessel, M.R., Pigg v. Clarke, 3 Ch. D. 674. In popular acceptance it includes parents, children, servants, and all those whose domicile or home is in the same house, and under the same management or head: Cheshire v. Burlington, 31 Conn. 329. In its more ordinary acceptation it signifies all the relatives who descend from a common root; in its most extensive scope, all the persons who live under the authority of another: Galligar v. Payne, 34 La. An. 1058: and another and more comprehensive definition is, "a number of persons who live in one house and under one management or head: Poor v. Hudson Ins. Cr., 2 F. R. 438. And a mother and sister were held to constitute a "family" within the exemption of earnings clause in a statute of the State of Kansas: Seymour v. Cooper, 26 Kansas, 539.

Depending on him for support.—The latter part of the section is of recent origin having been introduced by 52 V. c. 12, s. 23. The effect of the section in its present form is, that in the case of an ordinary debt the exemption does not apply to an unmarried person having no family dependent on him for support, the amount coming to him, no matter how small, being garnishable. In the case of a debt contracted for board or lodging there will be no exemption in any case unless, " in the opinion of the Judge the exemption of \$25 is necessary for the support and maintenance of the debtors family;" and in the case of a married person, having a family depending on him for support, if the debt is contracted for anything except for " board or lodging" the exemption applies.

Section 176

Attachment of debts due

Notice where jurisdic-tion of Court disputed to be given in garnishee cases.

176. In all cases where a defendant, primary debtor or garnishee intends to contest the jurisdiction of a Division Court to hear or determine any cause, matter or thing in for wages, such court, he shall leave with the clerk of the court, within eight days after the day of service of the summons on him (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen or twenty days before the return), a notice to the effect that he disputes the jurisdiction of the court, and the clerk shall forthwith give notice thereof to the plaintiff, primary creditor, or their solicitor or agents in the same way as notice of defence is now given, and in default of such notice disputing the jurisdiction of the court, the same shall be considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said action or proceeding had been properly commenced, entered or taken in such court; and the notice shall be in writing; and prohibition to a Division Court shall not lie in such action from any Court whatever, where the notice disputing the i disdiction has not been duly given as aforesaid. 43 V.c. 8, s. 14:48 V. c. 14, s. 1.

> Notice disputing jurisdiction.—This notice is an indispensable requisite to any proceeding founded upon the fact that a Division Court had no jurisdiction. A notice once given cannot, apparently, be withdrawn, except by consent of all parties under section 91; and a notice given by a primary debtor or garnishee would inure to the benefit of all parties. The notice need not be in any particular form. If it expresses the defendant's intention to dispute the jurisdiction, it would be sufficient; see Harpman v. Child, 1 F. & F. 652; Lowe v. Owen, 12 C. P. 101; Everard v. Watson, 1 E. & B. at p. 804, per Campbell, C.J.; Paul v. Joel, 4 H & N. 355; Bain v. Gregory, 14 L. T. N. S. 601; Aldridge v. Medwin, L. R. 4 C. P. 464; Allen v. Geddes, L. R. 5 C. P. 291. The notice must be in writing. For form of notice see Forms.

> Leave with the Clerk of the Court.—See notes to section 109, subsection (1).

> Within eight days.—The days mentioned in this section for doing certain things, are exclusive of the day of service; see notes to sections 86 and 109. The time for giving notice cannot be extended; notes to section 145 ante; nor abridged: Hamilton P. & L. Sooy. v. McKim, 18 P. R. 125.

> Forthwith.—See notes to section 20. As to manner of giving thisnotice, see notes to section 113, and section 113a, ante p. 162.

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Disputing the jurisdiction of such Court.—Statutes relating to the practice and procedure of a court only apply to matters within its jurisdiction: Ahrens v. McGilligat, 23 C. P. 171.

The necessity of a notice disputing the jurisdiction only arises where the cause is one triable in some Division Court. If it is beyond the jurisdiction of any Division Court, and is only suable in some higher court, then a person questioning the jurisdiction of the Division Court in which the action is brought, could avail himself of that right without giving any notice under this section: Mead v. Creary, 8 P. R. 374; 32 C. P. 1; Manufacturers and Merchants M. F. Ins. Co. v. Campbell, 1 C. L. T. 134; Re Knight v. Medora, 14 A. R. 112; Graham v. Tomlinson, 12 P. R. 367.

Should it be impossible for a party to leave with the clerk a notice disputing the jurisdiction owing to the absence of the clerk or a like cause, the defendant or primary debtor, as the case may be, would not be debarred of his right: see note to section 86, sub-section 3. And if the clerk omitted to give the notice required neither party's rights in the suit would be prejudiced by it. Should the clerk refuse to perform any part of his duty in regard to such notice, its performance could be enforced by mandamus: notes to section 70 title "Mandamus." And the omission by him to do so would render him liable for any damage either party could prove he had sustained, in consequence of such default: Parks v. Davis, 10 C. P. 229; Henly v. Mayor of Lyme, 5 Bing. 108; Ferguson v. Earl of Kinnoull, 9 Cl. & F. 251; Rogers v. Dutt, 13 Moo. P. C. 209; Carey v. Lawless, 13 U. C. R. 285.

An action would also be maintainable against his sureties on their statutory covenant: Nerlich v. Malloy, 4 A. R. 430; notes to section 35,

Prohibition shall not lie in such action from any court whatever.— These words were introduced to neutralize the effect of Clarke v. Macdonald, 4 O. R. 310, which was founded upon the English case of Oram v. Brearey, 2 Ex. D. 347, which case was overruled by Chadwick v. Ball, 14 Q. B. D. 855.

177. In all cases under the provisions of sections 181 dum on and 185 of this Act where the debt sought to be garnished summons. is for wages or salary, there shall be upon, or annexed to the summons served on the garnishee, a memorandum shewing the residence of the primary debtor and the nature of his occupation in the service of the garnishee at the time of the issuing of the summons (if then in such service), and also stating whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging, and in the absence of such last mentioned statement the said debt may be presumed by the garnishee not to have been incurred for board or lodging. 49 V. c. 15, s. 11.

Memorandum on Summons.—This section does not affect the rights of parties as they previously existed, but deals with procedure in garnishee proceedings only.

D.C.A.-17

Section 177 The following appear to be the pre requisites of summonses issued under either sections 181 or 185 of this Act where the debt sought to be garnished is wages or salary:—

- (1) That there shall be upon or annexed to the summons served on the garnishee, but not necessarily on the one served on the primary debtor, a memorandum shewing the residence of the primary debtor and the nature of his occupation in the service of the garnishee at the time of the issuing of such summons, if there is such service.
- (2) Also, stating therein whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging.

In the absence of such last mentioned statement, the debt sought to be garnished may be presumed by the garnishee not to have been incurred for board or lodging.

If the debtor is unmarried, and has no family dependent upon him, it would be wise to give the garnishee notice of that fact, as he would not then be justified in paying any money to him, the exemption in such case having been abolished.

This section evidently has for its object, mainly, the relief of railway and other corporations and large employers of labour. Before its introduction they were obliged to ascertain through the evidence at the trial whether, on their being garnished, they should pay the amount due by them less the exemption or independently of it.

The following may be used as a form of memorandum under this section, to be endorsed upon or annexed to the summons served on the garnishee:

- "Memorandum under 'The Division Courts Act,' section 177.
- "(1) The primary debtor resides at the City of Hamilton, in the Province of Ontario, and his occupation in the service of the garnishees is that of an engine-driver [or as the case may be] on the railway of the garnishees [The Grand Trunk Railway Company of Canada], and is occupied as such on said railway between the Cities of Toronto and Hamilton [or as the case may be].
- "(2) The debt alleged [or, if after judgment, 'adjudged'] to be due by the primary debtor to the primary creditor was [or 'was not'] incurred for board or lodging."

If the primary debtor is not in the service of the garnishee, of course nothing need be said of his occupation, for the object evidently is to save any mistakes where there may be several men of the same name in the employ of the garnishee, and to facilitate the identification of the primary debtor.

The above memorandum must in all cases, whether judgment has been recovered or not, where the debt sought to be garnished is for wages or salary, but not in other cases, be printed on or annexed to the summons served on the garnishee or garnishees. It had better be printed on the summons. If the memorandum does not state that the debt was incurred for board or lodging, the garnishee may presume that it was not so incurred. If not so incurred, \$25 would be exempt, unless the debtor was unmarried and had no family dependent upon him, and the garnishee should at once pay the same to the employee. The object is to give such information to the garnishee as will enable him to say whether or not the primary debtor may be entitled to the \$25 exemption mentioned in section 174 of this Act.

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178. After judgment has been recovered in a Division Attaching Court, application may be made to a Judge of the court, by granted on or on behalf of the primary creditor, on affidavit that such Judgment. judgment was recovered, and when, and that the whole, or some part, and how much, thereof remains unsatisfied, and that the deponent has reason to believe, and does believe, that some one or more parties (naming them, or stating that he is unable to name them) is or are within this Province, and is or are indebted to the primary debtor, for an attaching order (which the Judge is hereby authorized to make), to the effect that all debts owing to the primary debtor, whether due or not due, be attached to satisfy the judgment; which order may be in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts. R. S. O. 1877, c. 47, s. 127.

Judgment recovered .- That is duly entered by the clerk in the procedure book, or by the Judge: see notes to section 45. A judgment more than six years old could be enforced in this way: Fellows v. Thornton, 14 Q. B. D. 335.

It will be observed that this, and the following sections, make provision for an attaching order being obtained, which when served, shall have a certain effect: see section 179, and notes. A proceeding by attaching order only exists in cases where judgment has been recovered. judgment has not been recovered, a summons should be issued under section 185. An assignee of a judgment, though the action should not have been renewed in his name, might proceed under this and the following sections: Goodman v. Robinson, 18 Q. B. D. 332; McLean v. Bruce, 14 P. R. 192; Smart v. Miller, 3 P. R. 385.

On affidavit.—The affidavit on which to obtain an attaching order may be made by the solicitor of the judgment creditor or by a partner of the solicitor, or by any person having knowledge of the facts: In re Sato v. Hubbard, 8 P. R. 445. It will be observed that the deponent's belief that a debt is due, is sufficient: see Vinall v. De Pass, (1892), A. C. 90; Coren v. Barne, 22 Q. B. D. 249.

Proceedings on such order could not be prohibited on the ground that they were founded on a defective affidavit: In re Sato v. Hubbard,

Naming them or stating that he is unable to name them.—This authorizes what may be called "a roving garnishee order." Delay sometimes occurs in getting an ordinary garnishee summons issued and served. An attaching order enables a judgment creditor, so soon as he finds anybody who is indebted to his judgment debtor, to attach the debt, without first resorting to the issue of a summons. To obtain payment he must, however, issue the summons provided for in the next section.

Within the Province. In a garnishment proceeding, by way of attaching order, it is necessary that the garnishees should be resident

Sections 178-179

within the Province. A company having its chief place of business out of the Province, could not, therefore, be affected by an attaching order: Canada Cotton Co. v. Parmalee, 13 P. R. 308; Guy v. G. T. Ry. Co., 10 P. R. 372; Ahrens v. McGilligat, 23 C. P. 171.

It would appear, however, by reading sections 91, 181, 182 and 185 together, that non-resident garnishees may be proceeded against, provided they carry on business in the Province through an agent who has an office as such therein. See notes to section 91.

Is or are indebted. - See notes to section 173.

Owing whether due or not due.—It is submitted that these words have substantially the same significance as the words "any debt is due or owing " in section 173: see that section and notes thereto.

In the form. - See Form No. 41.

Service thereof to bind all

179. The service of the order on a garnishee shall have the effect (subject to the rights of other parties) of attaching and binding in his hands all debts then owing from him to the primary debtor, or sufficient thereof to satisfy the Garnishee judgment, and a payment by the garnishee into the court, or to the primary creditor, of the debt so attached to the extent unsatisfied on the judgment, shall be a discharge to that extent of the debt owing from the garnishee to the primary debtor. R. S. O. 1877, c. 47, s. 128.

may pay in his own discharge,

> The service. - It is submitted that the service of this order should, if possible, be personal: see notes to section 99; or at least it must be shewn that the order came to the knowledge of the garnishee: Ward v. Vance, 3 P. R. 130; Mason v. Muggeridge, 18 C. B. 642; Newman v. Rook, 4 C. B. N. S. 434; or that reasonable attempts have been made and proved fruitless, and the Judge has dispensed with personal service: see Tomlinson v. Goatly, L. R. 1 C. P. 230; rules, 53-56 and 90, and notes to section 100.

> Substitutional service could not be ordered of process upon a foreign corporation, firm or individual: Ontario Glass Co. v. Swartz, 9 P. R. 252. It is only where an agent has an office as such in the Province, that such persons can be reached, and then the process must be served on the agent: section 101.

> Service on the local agent of a foreign Insurance Company who had power merely to receive and transmit applications, was held a good service: Simpson v. Chase, 14 P. R. 280.

> It is the service which is effectual. Until service the order has no efficacy: Re General Horticultural Co., Ex parte Whitehouse, 32 Ch. D. 512; Tate v. Corp. of Toronto, 3 P. R. 181, and where a garnishee was advised by telegram that the money had been garnished, but paid the money nevertheless, to the debtor before service, it was held, that the debt was not attached : O'Donovan v. Dillon, 24 L. R. Ir. 442.

> Effect of the order.—The order binds "all debts then owing" from the garnishee to the primary debtor. It is to be observed that nothing is bound but a "debt." Should there be merely a contingent liability or a claim sounding in damages it would not be bound or affected by the order. Care should, therefore, be taken by the garnishee, that he pays nothing

but a debt. Where a garnishee was subject to a liability for unliquidated **Section** damages, and allowed a garnishee order absolute to be made by default against him, and afterwards the claim became liquidated by an award, and the money was then claimed under a prior assignment by third parties, it was held that the garnishees had no right to interplead, and that he merely had himself to blame in not appearing and shewing to the court that there was no attachable debt due: Randall v. Lithgow, 12 Q. B. D. 525.

Until an order to pay is obtained, the primary debtor has the right to enforce all his remedies against the garnishee. If, therefore, the debtor has a judgment and execution, the garnishee should pay the amount to the sheriff advising him at the same time of the existence of the attaching order: Genge v. Freeman, 14 P. R. 330.

This is equivalent to payment into court, inasmuch as the payment is to an officer of the court, in trust for the proper person: Turnbull v. Robertson, 38 L. T. N. S. 389. After a garnishee order absolute, an execution against the garnishee issued by the primary debtor would be stayed: Re Connan, Ex parte Hyde, 20 Q. B. D. 690.

It is next to be observed that all debts are attached. Where a debtor had £6,800 on deposit with the garnishees, and an attaching order was made to satisfy a judgment of £6,000, it was held that under the terms of the order, the garnishee was justified in refusing to pay cheques for the balance over £6,000: Rogers v. Whiteley, 23 Q. B. D. 236; (1892), A. C. 118. An order might be made, however, restricting the attachment to such amount as will satisfy the judgment debt, but care must be taken that no part is released, unless it is clear that the whole amount due by the garnishee is the beneficial property of the judgment debtor: Ib. The garnishee should not pay any amount to the judgment debtor, until after the summons to be issued under section 180 has been disposed of, and judgment given ordering payment by the garnishee: Turner v. Jones, 1 H & N. 878; Sykes v. Brockville & Ottawa Ry. Co., 22 U. C. R. 459; Tate v. Corp. of Toronto, 10 U. C. L. J. at p. 67.

Payment into court will be an effectual discharge of the garnishee if the amount due by him was an attachable debt, and the court had jurisdiction: Culverhouse v. Wickins, L. R. 3 C. P. 295; Mayor of London v. Cox, L. R. 2 H. L., at pp. 261, 262, and even if the court has no jurisdiction, if the garnishee without collusion and in ignorance of the want of jurisdiction, pays under compulsion of the attachment, he will be protected: Banks v. Self, 5 Taunt. 234; Harrington v. McMorris, 5 Taunt. 228; Westoby v. Day, 2 E. & B. 605; Wood v. Dunn, L. R. 1 Q. B. 77; L. R. 2 Q. B. 73. The effect of binding all debts in the hands of the garnishee, is to give the primary creditor the security of the garnishee to the extent of his indebtedness. Indeed, it was once said that: "The moment the order of attachment is served upon the garnishee, the property in the debt due from him is absolutely transferred from the judgment debtor to the judgment creditor:" per James, L.J., ex parte Joselyne. Re Watt, 8 Ch. D. 327 at p. 330; Emanuel v. Bridger, L. R. 9 Q. B. 290; Low v. Blackmore, L. R. 10 Q. B. 485; but this was but a colloquialexpression, and meant nothing more than that the debt was bound : per Brett, L.J.: Chatterton v. Watney, 17 Ch. D. 261; and see per Cotton, L.J., and Jessel, M.R.: "the order does not transfer the debt:" Ib. 262, and it is now clear that a garnishee order does not transfer the debt: Re Combined Weighing & Ad. M. Co., 43 Ch. D. 99; Wood v. Joselin, 18 A. R. 60.

Until an order to pay is obtained against the garnishee, the primary creditor holds no judgment against him. After such order is obtained, the primary creditor, it is submitted, holds a judgment against the garnishee so as to entitle him to have a judgment summons issued under section 235: Cowan v. Carlill, 52 L. T. N. S. 481; 83 W. R. 583.

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The proceeding in garnishment is purely collateral to the action between the primary debtor and the primary creditor, and when the right of the primary creditor to enforce his claim in the main proceeding is at an end, the charge upon the debt in the hands of the garnishee drops with The primary creditor never becomes a creditor of the garnishee. The garnishee continues to be a debtor to his own creditor, until he has paid info cart, or to the attaching creditor, after order so to pay, or a key of the abount has been made of his property, when he ceases to be a depth of to the amount paid or levied: Wardrope v. Canadian Pacific Ry. Co., 7 O. R. 321; The Combined Weighing & Ad. M. Co., 43 Ch. D. 99; but the judgment creditor's rights against the garnishee, would be defeated by a discharge in insolvency, in the same manner as that of an ordinary or ditor: Kent v. Tompkinson, L. R. 2 C. P. 502, Inasmuch as the primary creditor never becomes a creditor of the garnishee, the amount payable by the garnishee to him, cannot be garnished for a debt due by the primary creditor: Cooper v. Lawson, 6 T. L. R. 34. The rights of the primary creditor as against an assignee for the benefit of creditors, a sheriff claiming under a Writ of Attachment or under the Creditor's Relief Act, and the holders of Mechanic's Liens, will be found considered in the notes to section 197.

If there are several attaching orders they rank in the order of their service: Tate v. Corp. of Toronto, 3 P. R. 181; Sweetnam v. Lemon, 13 C. P. 534; but only to the extent of the debt due at time of service: Parker v. Howe, 12 P. R. 353.

The order does not give any right to the securities for the debt, and where a mortgagee of leasehold property was a judgment debtor and a garnishee order was served on the mortgagor, it was held that the judgment creditor had no interest in the land and was not entitled to a surplus in the hands of a prior mortgage, after a sale of the mortgaged premises: Chatterton v. Watney, 16 Ch. D. 378; 17 Ch. D. 259.

Payment to any but primary creditor void.

180. Any payment by the garnishee, after service on him of the order, to any one other than the primary creditor, or into court, to satisfy the judgment, shall to the extent of the primary creditor's claim, be void; and the garnishee shall be liable to pay the same again, to the extent of the primary creditor's claim, to satisfy the judgment. R. S. O. 1887, c. 47, s. 129.

Any Payment.—The garnishee should not make any payment, except into court, until after the summons mentioned in section 181 has been heard and an order for payment made: see cases cited in notes to section 179.

If the service of the order is not good the garnishee could, probably pay over the money to the primary debtor with impunity: Cooper v' Brayne, 3 H. & N. 972 Am. Ed. So also if there was no attachable debt Randall v. Lithgow, 12 Q. B. D. 525; Stuart v. Grough, 15 A. R. 299.

Payment into court would protect the garnishee, if an attachable debt existed at the time of service of the order: Culverhouse v. Wickens, L. R. 3 C. P. 295; see remarks of Willes, J., at p. 297. To discharge the garnishee there must be an attachable debt and either payment made under compulsion of law or execution levied: Sykes v. Brockville & Ottawa Ry. Co., 22 U. C. R. 459; Carr v. Baycroft, 4 U. C. L. J. 209; McNaughton v. Webster, 6 U. C. L. J. 17. The payment to the creditor

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t made ville & J. 209: reditor must be made by compulsion of law. "Some process of law which amounts to compulsion is indispensable for this purpose, indispensable for the indemnity of the garnishee and, therefore, indispensable in order that the garnishee should be bound:" Mayor of London v. London Joint Stock Bank, 6 App. Cas. 393, 400; Stuart v. Grough, 15 A. R. 299, 305.

Sections

Be void.—See Rule 58. The payment to the debtor is ineffectual as against the claim of the primary creditor. The garnishee would not be able to recover the money back from the primary debtor if he paid the amount voluntarily, unconditionally and with full knowledge and recollection of the attaching order: Bilbie v. Lumley, 2 East, 469; Townsend v. Croudy, 8 C. B. N. S. 477; Perry v. Newcastle, 8 U. C. R. 363; Montreal Ass. Co., v. McCormick, 25 U. C. R. 440; Baldwin v. Kingstone, 18 A. R. 63, 83, 98, 109, 672.

Liable to pay the same again. The liability of the garnishee to pay the claim of the judgment creditor, notwithstanding the intermediate payment to the judgment debtor, is but the logical consequence of the attachment which effectually bound the debt.

181. Whether such attaching order is or is not made, Primary the primary creditor may cause to be sued out of the may sum-Division Court for the Division in which the garnishee, or garnishee, one or more of them, if there be joint garnishees, resides or carries on business, a summons in the form prescribed by the General Rules or Orders, from time to time in force, relating to Division Courts, upon or annexed to which shall be a memorandum shewing the names of the parties as designated in the judgment, the date when, and the Court in which, it was recovered, and the amount unsatisfied; which summons shall be returnable either at any ordinary sittings of the Court, or at such other time and place (to be named therein) as the Judge may permit or appoint, either by a general order for the disposal of such matters or otherwise. R. S. O. 1877, c. 47, s. 130.

Joint garnishees.—This phrase has not been judicially interpreted in any reported case. It is probable that it would be held to extend only to a case where the garnishees were jointly liable. Otherwise garnishees from all corners of the Province might be summoned to a distant court merely because they and a person with whom they had no joint interest happened to have a common creditor.

Resides or carries on business.—See notes to section 81, and see also notes to section 99 as to the service of the summons. If the gernishee be a foreign firm or individual having, however, an agent in the Province who has an office as such agent, it is possible that the garnishee would sufficiently carry on business within the division where such agent had his office, to justify the issue of process therefrom: see section 101. Care must be taken, even in the case of a foreign firm, to make the individual partners garnishees: Walker v. Rooke, 6 Q. B. D. 631.

A summons.—For form of summons, see Form No. 43.

Sections 181-182

In which it was recovered .- It is submitted that if an attaching order has been issued, a summons may be issued from any court in which a garnishee resides or carries on business, but if no attaching order has been issued and if the judgment was recovered in a division in which no garnishee "resides or carries on business" the judgment must be trans. ferred under section 217 and Rule 57; and then on the judgment being fully entered in the court of the division in which the garnishees or one or more of them reside or carry on business, all proceedings can thenceforth be entitled and taken in that court as if originally commenced and judgment "recovered" there.

At such other time and place.—This would allow the Judge to appoint any "time and place" within the County for the disposal of such matters. It is submitted that justice and the convenience of parties will be best served by trying such matters at regular sittings only, unless under exceptional circumstances.

Service on corpora-·head office is not in the Province.

182. In proceedings under the preceding section, where tion, whose the garnishees are likewise a body corporate, not having their chief place of business within the Province, then the summons mentioned in said last mentioned section shall be issued from the Division Court in which the judgment has been recovered, and shall be served upon the agent of the body corporate, whose effice as such agent is either within the division in which the judgment has been recovered, or is nearest thereto. 47 V. c. 9, s. 3.

> A body corporate.—The late Chief Justice Marshall, of the Supreme Court of the United States, defines a corporation as: "An artificial being, invisible, intangible, and existing only in contemplation of law:" Dartmouth College v. Woodward, 4 Wheaton, 518, 636.

See also notes to section 185, sub-section (2).

Not within the Province.-What has been said in the notes to section 101 (pp. 137, 138), has also application here. See also section 185, subsection 2.

In which the judgment has been recovered.—This section has only application to cases "in which judgment has been recovered." Where there is no judgment, provision is made for service of garnishee summons under sections 185, 186.

Judgment may be said to be "recovered," in cases not tried, when the decision of the case has been duly entered by the clerk of the court in the Procedure Book, or when given by the Judge in cases which are tried: Strutton v. Johnson, 7 L. C. G. 141; R. v. Rowland, 1 F. & F. 72; Dews v. Riley, 11 C. B. p. 443: Tubby v. Stanhope, 5 C. B. 790.

It is submitted that "judgment has been recovered," within the meaning of this section, only in that court in which the judgment was originally entered, and that this provision does not apply to cases of judgment on transcript.

Service on agent.—Section 185, sub-section (3), provides that every person who within Ontario transacts or carries on any business of, or business for, such body corporate shall be deemed the agent thereof under this section. A local agent of an insurance company, whose authority was limited to receiving and transmitting applications for insurance, is an agent within the meaning hereof: Simpson v. Chase, 14 P. R. 280.

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Nearest thereto.—Distance is measured in a atraight line, as the Sections crow flies. The point in the division nearest to the agent's office should 182-183 be taken as the starting point. The place of sitting has nothing to do with the question in this case: see Mouflet v. Cole, L. R. 8 Ex. 32.

183. A copy of the summons and memorandum shall Mode of be duly served on the garnishee, or, if there be joint garnishees, then on such of them as are within the reach of the process, at the time and in the manner required for the service of summonses in ordinary actions for corresponding amounts, and also on the primary debtor, if thought advisable, or if required by the Judge. R. S. O. 1877, c. 47, s. 131.

Served on the guarnishee.—See notes to sections 99 and 179. As the proceedings against a garnishee are effectual only upon service, it is submitted that if the garnishee should die before service, the debt could not be reached without proceedings against his representatives: Re Easy, Ex parte Hill & Hymans, 19 Q. B. D. 538.

Joint garnishees. - See notes to sections 81, 97 and 181, and Rules 53, 54 and 55.

If thought advisable.—See notes to section 179.

The words "if thought advisable" in this section are of very dcubtful meaning. It does not say by whom it may be "thought advisable." The writer cannot express any opinion as to what is the proper meaning to be given to these words. It is suggested, however, that they can only mean "if thought advisable" by the primary creditor, as provision is afterwards made if the Judge requires service to be made.

The summons should, in all cases, be served on the primary debtor: Ferguson v. Carman, 26 U. C. R. 26; Beaty v. Hackett, 14 P. R. 395. The result of the proceeding must be to incur costs, and no judgment debtor should have his credits reduced or his debts increased without an opportunity of being heard: McLean v. Allen, 14 P. R. 84.

At Common Law, every person whose rights are to be affected by any legal proceeding has a right to be heard: Maxwell on Statutes, 325; Thorburn v. Barnes, L. R. 2 C. P. 384; Re Pollard, L. R. 2 P. C. 106. The debtor should know of the proceedings, for the judgment upon which they were founded might possibly have been satisfied by him years before, or have become effecte; or if the debt had been assigned, and no notice given by the assignee, as he is not bound to do: Robinson v. Nesbitt, L. R. 3 C. P. 264, the proceeding would lead to a great deal of trouble, if not injustice. On this question we cannot do better than quote the words of a writer in the Law Journal. "We think that a Judge could not, for any reason of such mere convenience of the creditor and garnishee, dispense with service, but should insist on its being made in every case which requires personal service in ordinary cases, if practicable:" 10 L. J. N. S. 65, 66. Attempts should at least be made to serve the party, and evidence of these presented to the Judge. "Whether or not the efforts made to serve the defendant are reasonably sufficient, must in all cases be matter for the discretion of the Judge:" Tomlinson v. Goatly, L. R. 1 C. P. page 231, per Erle, C.J. In that case the process-server had called twice at the defendant's office, and once by Sections 183-184 appointment of his clerk, at none of which times was the defendant in; but nothing was said to the clerk of the purpose of the process-server. Willes, J., appeared to think it insufficient to warrant ulterior proceedings: page 232.

Judgment at hearing.

184. At the hearing of the summons, or at any adjourned hearing, on sufficient proof of the amount owing by the garnishee to the primary debtor, and no sufficient cause appearing why it should not be paid and applied in satisfaction of the judgment, the Judge may give judgment against the garnishee (which judgment may be in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts), for the amount so owing from him, or sufficient thereof to satisfy the judgment; and execution against the garnishee to levy the same, may issue thereon as of course, if due, or when and as it becomes due, or at such later period as the Judge n ay order, which execution may be according to the form prescribed as aforesaid. R. S. O. 1877, c. 47, s. 132.

At the hearing of the summons.—To "hear a cause or matter means to hear and determine it." And "unless there be something which by natural intendment, or otherwise, would cut down the meaning, I apprehend there can be no doubt that the Legislature, when they direct a particular cause to be heard in a particular court, mean that it is to be heard and finally disposed of there. And further, when they say that it is to be heard—(meaning heard and finally disposed of)—in a particular court, they mean, unless there is something in the context which either by natural interpretation or by necessary implication would cut it down, that in all matters which are not provided for that court is to follow its ordinary procedure:" per Lord Blackburn, k_t Green, 51 L. J. Q. B. 44; or, as Selborne, L.C., puts it in the same case, "Hearing" includes not only its necessary antecedents, but also the necessary or proper consequences: Green v. Penzance, 6 App. Cas. 657; Stroud, 342.

Sufficient proof.—See notes to section 187.

A Judge of a Division Court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor; and for such a course prohibition will lie: In re Johnson v. Therrien, 12 P. R. 442.

By D. C. Rule 56 provision is made as follows: "If the garnishee or the primary debtor, having been served, does not appear on the return of such summons, judgment may be given against him by default; and if only some of the parties required to be served are served, the Judge may give the same judgment against those served as in ordinary cases."

No sufficient cause appearing,—that is, no question arising which the Judge has to try.

May give judgment.—Judgment should not be given against garnishee if there is any suggestion that the debt has been assigned, or is not the beneficial property of the debtor. Such suggestion may come either from the debtor or the garnishee: Lovely v. White, 12 L. R. Ir. 381.

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If the garnishee has a lien upon the money, judgment can only be sections given for the balance due after satisfying the lien: Nathans v. Giles, 184-185 5 Taunt. 558; Nolen v. Crook, 5 Humphrey, 312; Smith v. Clarke, 9 Iowa, 241; Grant v. Shaw, 16 Mass. 341; Curtis v. Norris, 8 Pick. 280; Goddard v. Hapgood, 25 Vermont, 181; or if he is entitled to any set-off: Hesse v. Buffalo, B. & G. Ry. Co., Chambers 30 March, 1857, per Robinson, C.J.; Nedley v. same defendants, 3 U. C. L. J. 111; or if the debtor is bound to indemnify him against a claim for which he is liable: Rymill v. Wandsworth, Dist. Bd. 1 C. & E. 92; but a mere cross-claim, which cannot be set-off, or which would amount only to a counter-claim would not entitle the garnishee to resist judgment for the full amount of the debt: Stumore v. Campbell, (1892), 1 Q. B. 314.

No set-off will be allowed the garnishee of a debt due by the judgment creditor to him: Sampson v. Seaton & Beer Ry. Co., L. R. 10 Q. B. 28; but if the garnishee had obtained judgment against the primary creditor, the judgment might be set-off under section 213.

Form prescribed.—See Form No. 45.

Amount so owing.—The Legislature here clearly intended to use no uncertain expression, but employed a word meaning a debt whether past due or maturing.

To satisfy the judgment.—This would include the costs of recovering judgment, and which form part of it; but would not, in itself, cover the costs of garnishment proceedings, to meet which section 192 was introduced in 1880.

And when it has become due. - The order went in this form in Tapp v. Jones, L. R. 10 Q. B. 591; see notes to section 173. No different mode of payment can be substituted than that which exists between the primary debtor and garnishee: Turner v. Jones, 1 H. & N. 878; and the garnishee will not be compelled to pay until the term of credit expires: Harding v. Barratt, 3 U. C. L. J. 31.

Form prescribed as aforesaid.—See Form No. 86.

Where the Primary Creditor's Claim not a Judgment.

185. (1) Where judgment has not been recovered where no judgment, for the claim of the primary creditor, he may cause summons on garma summons to be issued out of the Division Court issue, to issue, of the Division in which the garnishee, or one or more of them, if there be joint garnishees, live or carry on business, in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, upon or annexed to which shall be a memorandum, shewing the names of the primary creditor, the primary debtor, and of the garnishee, and the particulars of the claim of the primary creditor, with reasonable certainty and detail; which summons shall be returnable as required by section 181 of this Act, in respect to the summonses therein mentioned. R. S. O. 1877, c. 47, s. 133.

Sections 185-186 (2) In the event of the garnishees being a body corporate, not having their chief place of business within the Province, then the summons shall be issued out of the Division Court for the division in which the cause of action arose, and shall be served upon the agent of the body corporate, whose office, as such agent, is nearest to the place where the cause of action arose. 47 V. c. 9, s. 2.

Who to be deemed agent.

(3) Every person who within Ontario transacts or carries on any business of, or business for, such bod corporate, shall, for the purpose of this section and of ion 182, be deemed the agent thereof. 47 V. c. 9, s. 4.

The claim.—That is a "debt or money demind," as mentioned in section 173.

Live or carry on business.—See notes to section 81 and section 181. With reasonable certainty and detail.—See notes to section 109.

Body corporate.—It will be observed that this only applies to "a body corporate," and not to a partnership merely, though trading or doing business under a company name. Section 101 provides for service of process on foreign corporations, firms and individuals who have agents as such within Ontario. It would seem that a foreign garnishee, not being a corporation, would carry on business where he had an agent as such, and that process could properly be issued against a foreign firm or individual from the court of the division where the office of the agent was situated.

Formerly the servants and employees of foreign corporations could not be garnished in the Division Court: see Ahrens v. McGilligat, 25 C. P. 171; Westover v. Turner, 26 C. P. 510. But this provision was introduced in 1884, in order to provide a remedy in such cases, and section 101 was amended in 1889, to extend the remedies against foreign firms and individuals.

Chief place of business .- See notes to section 101.

Cause of action arose. - See notes to section 81.

Served upon the agent.—A form of affidavit of service of this summons will be found in the appendix. The definition of an agent will be seen to incl. de any person who has an office as agent for the company: see notes to section 101. An agent for an insurance company whose powers are limited to receiving and transmitting applications is an agent: Simpson v. Chase, 14 P. R. 280.

Nearest to the place, etc.—See notes to section 182.

Service on companies.

186. A copy of the summons and memorandum shall be duly served on the garnishee, or if there be joint garnishees, then on such of them as are within reach of the process, at the time and in the manner required for service in ordinary cases; and also, if practicable, on the primary debtor, unless the Judge for sufficient reason dispenses therewith. R. S. O. 1877, c. 47, s. 134.

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Dispenses therewith.—The concluding words of the section are hard Sections to understand. There being no judgment against the primary debtor, his property should not be taken away without a chance being given him to be heard. Dispensing with service upon him would have this result. The proper course to take, when the primary debtor cannot be found, would appear to be to order substitutional service under section 100, which would be equivalent to due service, and the action could then proceed in the ordinary way. It must, however, be borne in mind that the court must have jurisdiction over the primary debtor. If he is a foreigner who does not carry on business through an agent in the Province, no Division Court would have jurisdiction over him: Ontario Glass Co. v. Swartz, 9 P. R. 252. In Wadsworth v. Queen of Spain, 17 Q. B. 171, the garnishees moved, and in De Haber v. Queen of Portugal, 17 Q. B. 195, the primary debtor moved for prohibition upon the ground that the court had no jurisdiction over the primary debtor, and in each case the prohibition was granted. Lord Campbell, C.J., said: "We entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the court from which it The garnishee is safe by paying in under the judgment of the court, but the objection that the cause of action did not arise within the jurisdiction of the court, if properly taken, must prevail." See also Mayor of London v. Cox, L. R. 2 H. L. 266: but the garnishee must act without collusion and in ignorance of the want of jurisdiction to be protected: see notes to section 179.

187. If in such case the primary debtor has been duly judgment in such served with a copy of the summons and memorandum, case. judgment (in the usual form in other cases) may be given against him at the hearing for the primary creditor, for the whole, or such part of the claim as is sufficiently proved, and execution may afterwards issue thereon as in other cases; and whether such judgment is or is not given, the Judge, on sufficient proof of the debt due and owing from the primary debtor, and also of the amount owing to him from the garnishee, may then, or at any adjourned hearing, give judgment against the garnishee (which may be according to the form prescribed as aforesaid) for the amount so found due from the garnishee, to the extent of the amount so found due from the primary debtor, which sum the garnishee shall pay into court, or to the primary creditor, towards the satisfaction of the claim, or in default thereof, execution may issue to levy the same forthwith, or at such later period as the Judge may direct, which execution may be according to the form prescribed as aforesaid. R. S. O. 1877, c. 47, s. 135.

Has been duly served.—See sections 183 and 186. This seems to make it compulsory that due service should be made; i. e. either per187-188

Sections sonal or its equivalent. The clause "and whether such judgment is or is not given," etc., may read as subject to the precedent requirement of service.

Sufficiently proved .- See notes to section 184. Proof of the debt due by the garnishee must be given: Re Johnston v. Therien, 12 P. R. 442; and it would seem that under this section a strong argument may be presented that "sufficient proof" of the debt due and owing from the primary debtor must also be presented, and that reliance cannot be placed on section 110 so as to enable judgment by default to be entered.

Is or is not given.—The adjudication against the primary debtor and garnishee need not be made at the same time, nor embraced in one order, but it frequently is so: see Victoria Mut. Ins. Co. v. Bethune, 1 A. R. 434.

There can be no judgment against the garnishee until final judgment is recovered against the primary debtor: see Washburn v. N. Y. & V. M. Co., 41 Vermont, 50; Emanuel v. Smith, 38 Ga. 602; and if judgment against the primary debtor be reversed, that against the garnishee should also be reversed: Rowlett v. Lane, 43 Texas, 274; and restitution will then be ordered: McKindsey v. Armstrong, 11 P. R. 200.

The garnishee's liability must be affirmatively shown, and it always devolves upon the primary creditor to make out his case against the garnishee: Webster v. Gage, 2 Mass. 503; Porter v. Stevens, 9 Cushing, 530; Re Johnson v. Therien, 12 P. R. 442.

Sufficient proof.—See Rule 56, also notes to section 184, and notes supra.

Form prescribed.—Form No. 46.

Amount so found due. This only refers to the debt, and would not, but for section 192, include the amount of the creditor's costs. The judgment was formerly final and conclusive: per Moss, J., at pp. 431, 433 and 434 of 1 A. R.; but provision is now made for appeal in cases in which the sum in dispute upon the appeal exceeds \$100: see section 148. In other cases it is still final, subject to the right of the Judge to set it aside or grant a new trial.

A married woman would be subject to judgment as a garnishee. Her separate property, however, would only be bound: Palliser v. Gurney, 19 Q. B. D. 519; Scott v. Morley, 20 Q. B. D. 120.

For form of a judgment against a married woman in action of contract see Schedule of Forms. Judgment against her could easily be adapted.

The provisions of action 111, as to speedy judgments do not apply to garnishee proceedings: Cameron v. Allen, 10 P. R. 192. Judgment can only be given as provided for in this section.

General Provisions.

All parties may show cause, etc.

188. (1) In cases under this Act, and whether the claim of the primary creditor is or is not a judgment, the primary debtor, the garnishee and all other parties in any way interested in, or to be affected by the proceeding, shall be entitled to set up any defence, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary action, and also any such

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Section

(2) A primary debtor or garnishee who desires to set up Defences in gar. a statutory or other defence or set-off, or to admit his nishee proceedings. liability in whole or in part for the amount claimed in such action shall file with the clerk the particulars of such defence or set-off, or an admission of the amount due or owing by the primary debtor or the garnishee, as the case may be, within eight days after service on him of the summons, and the clerk shall forthwith send by mail to each of the said parties to the action a copy of such defence, set-off or admission, and the primary creditor may file with the clerk a notice that he admits the defence or set-off, or accepts the admission of liability as correct; a copy of the notice shall be sent by the clerk by mail, forthwith to the garnishee, and in the absence of any notice of defence or set-off, from any primary debtor or garnishee, the Judge may, in his discretion, give judgment against such primary debtor or garnishee; and in the event of the primary creditor failing to file a notice admitting or rejecting such defence, set-off or admission of liability, the garnishee shall not be bound to attend at the trial, and the sum admitted to be due or owing by the garnishee, shall be taken to be the correct amount of his liability unless the Judge shall otherwise order, in which latter case the garnishee shall be notified by the clerk and shall have an opportunity of attending at a subsequent date and being heard before judgment is given against him.

(3) The cost of all notices required to be given under costs. this section, shall be costs in the cause, and in no case shall be payable by the garnishee, unless specially ordered by the Judge. 49 V. c. 15, s. 12

Section 188 In any way interested.—This section gives an extensive power to all parties concerned to defeat the claim of the plaintiff. The garnishee, or any other party interested, may dispute the claim of the primary creditor against the primary debtor, and likewise the primary debtor or any third party may defeat, so far as the primary creditor is concerned, the claim against the garnishee. Ordinarily the defences of the Statutes of Frauds and Limitations are personal, but under this section third parties would be allowed to set them up and defeat a claim which the party liable did not care himself to defeat.

Any defence.—A set-off would be a defence.

Just causes why debt should not be paid over.—The following are suggested as arguable reasons for not ordering the money to be paid over:—

- (a) Not a debt.
- (b) Not the property of the debtor.
 - (1) Assignee.
 - (2) Prior attachment.
 - (3) Absconding debtor.
 - (4) Creditors Relief Act.
 - (5) Mechanics Lien.
- (c) Subject to a lien.
 - (1) By garnishee.
 - (2) By solicitor of debtor.

The Judge may adjudicate upon any of these claims at the hearing, if all parties are present, or may make the adverse claimant a party and aummon him: see section 197. Ordinarily, it will be found more convenient to issue a summons. If all parties should be present, and the rights clear, a summons will be renecessary: Wintle v. Williams, 3 H. & N. 288: Victoria M. F. Ins. Co. v. Bethune, 1 A. R. 420.

It is incumbent on the garnishee, if he knows of any just cause why the money should not be paid over, to bring the cause to the notice of the court. If the money should not be a debt within the meaning of the attachment clauses, he might have to pay twice: Randall v. Lithgow, 12 Q. B. D. 525; Victoria Mut. Ins. Co. v. Bethune, 1 A. R. 423; or if the court has no jurisdiction, and the garnishee is aware of the fact: see notes to section 179. If he has notice before the hearing of an assignment, or of bankruptcy, he would be bound to shew cause, and if he were to pay to the primary creditor, instead of shewing cause, the assignees could recover the debt from him: Wood v. Dunn, L. R. 2 Q. B. 73. If he had notice of any facts which might bring the money within any of the suggested cases above mentioned, he should for the same reason shew cause. If he should not have notice of any of these causes, before judgment, but should receive same afterwards, and before paying the money three courses are open to him: (1) He may pay without taking any further step, which is unsafe unless there is no time to get the judgment set aside before execution; (2) he may move to set aside the judgment, and ask the court to bring in the third party; (3) he may give notice to the third party that unless he moves to set aside the judgment, the money will be paid thereon: Wood v. Dunn, L. R. 2 Q. B. 73, reversing L. R. 1 Q. B. 77.

Should the money be paid to the judgment creditor, the third party will not, however, be without remedy, as he may recover the money, if he is entitled to it, from the judgment creditor, as money received to his use: Wood v. Dunn, L. R. 2 Q. B. 77. Quare: Whether notice to the

Sections

judgment creditor at the time of receiving the money, that it is the property of a third party, is necessary: Sisdell v. Cunningham, 4 H. & N. 871. It would seem to be proper for the claimant, before suing the primary creditor for the money, to move under section 195, for an order discharging the debt from the claim of the primary debtor.

Statutory or other defence or set-off.—It will be observed that this sub-section has application not only to any statutory defence which the primary debtor or garnishes may have, but also to any other defence or set-off. Formerly it applied only to statutory defences and to set-off as in the case of an ordinary action. But these provisions were introduced by the Act of 1886 (49 V. c. 15, s. 12). As to the defence of set-off, Statute of Limitations, and other statutory defences, see notes to section 128.

Within eight days.—This means exclusive of the day of service: see notes to section 86, sub-section (3); Stroud, 889.

In Simpson v. Chase, 14 P. R. 284, Mr. Justice Osler said: "The section 188, sub-section 2, is most awkwardly and loosely drawn, but I am disposed to think that even if the defence of the garnishee was put in after the expiration of the eight days after service, so long as it was put in in sufficient time to enable the creditor to give notice rejecting it, and for the clerk to transmit such notice to the garnishee, the latter would not be bound to attend the trial if such last mentioned notice was not given and the creditor would not be able to proceed to the trial of the action, until that was done. The object of the section is to relieve the garnishee from the expense of attending the court and defending the case if the creditor will accept his admission of liability, or will tell him that he will not dispute his defence. The onus of doing this is on the creditor, and the garnishee having filed his defence or admission, need not concern himself further unless the former warns him that he must be prepared to support it."

Judgment cannot be given against the garnishee without proof of the amount owing by him to the judgment debtor, even though no notice be given, there being nothing in this sub-section which repeals the condition precedent in section 184 to the Judge's giving judgment against the garnishee: Johnson v. Therien, *In re* 12 P. R. 442.

Costs. - See section 191.

Is 1. In all cases under this Act, (except where an attachsummons ing order has been served, already provided for), service of on saminous on the garnishee shall have the effect of attach-bind debt until ing and binding in his hands (subject to the rights of other hearing parties), the debt sought to be garnished, from the time of the service until a final decision made on the hearing of the summons; and any payment of the debt by the garnishee during such period, to any one other than the primary creditor, or into court for satisfying his claim shall, to the extent of the claim be void, and the garnishee shall be liable to pay the same again to the extent of the claim to satisfy the same, unless the Judge otherwise orders. R. S. O. 1877, c. 47, s. 137.

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the money, if received to his notice to the Sections 189-190 Attaching and binding.—See note to section 179, ante, p. 260.

Until a final decision made.—When the Judge fully decides the matter, the "attaching and binding" shall be at an end, unless judgment is given against the garnishee: see Belhouse v. Mellor, 4 H. & N. 116.

It will be seen that the garnishee would pay over the money, to any one but the primary creditor or into court, at his peril.

The debt is bound by the garnishment "until a final decision is made on the hearing of the summons." Should the hearing of the matter be adjourned until another sitting, the garnishment would still hold. Judgment against the primary debtor and the garnishee may be rendered at different times, but there must be a judgment against the primary debtor before anything can be awarded against the garnishee: see notes to section 173. Drake on Attachment, 5th Ed., ss. 228, 262, 658.

Or into Court.—The safer course is to pay the amount into court: Sykes v. Brockville & Ottawa Ry. Co., 22 U. C. R. 459; Culverhouse v. Wickens, L. R. 3 C. P. 295; but this is not an absolute protection, as, if the amount was not a debt at the time of service, or if the court is without jurisdiction: *see notes to section 180.

"It has been said that when a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable merely. In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word 'void' would be understood as 'voidable' only at the election of the persons for whose protection the enactment was made, and who are capable of protecting themselves, but that when it relates to persons not capable of protecting themselves, or when it has some object of public policy in view, which requires the strict construction, the word receives its natural full force and effect:" Maxwell on Statutes, 190. By Rule 58, it is declared that "no payment shall be made by a garnishee to a primary creditor before judgment given against the primary debtor," except on order of the Judge.

Unless the Judge otherwise orders.—This a Judge would probably do if the primary creditor had, either by his words or acts, assented to the payment by the garnishee to any other than himself of the moneys garnished: In re Jones. Ex parte Kelly, 7 C. P. 149; Freeman v. Cooke, 2 Ex. 654; Johnson v. Credit Lyonnais Co., 3 C. P. D. p. 40; De Bussche v. Alt., 8 Ch. D. 286; In re Bahia & San Francisco Ry. Co., L. R. 3 Q. B. 584, and that class of cases.

and after judgment.

190. If judgment be given for the primary creditor against the garnishee, the debt garnished shall, unless the Judge otherwise orders, continue bound in the hands of the garnishee to satisfy the claim of the primary creditor; and payment in such case by the garnishee of the debt to the extent of the claim, either into Court or to the primary creditor, shall, to that extent, be a discharge to the garnishee, as between him and the primary debtor; and any payment thereof, otherwise than last aforesaid, except by

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leave of the Judge, shall be void; and the garnishee in such case shall be liable to pay the same again to satisfy the claim of the primary creditor. R. S. O. 1877, c. 47, s. 138.

Continue bound in the hands of the garnishee.—This section goes on to provide for the security of the primary creditor after judgment.

The debt garnished continues to be bound after judgment, unless the Judge otherwise orders, and any payment made by the garnishee, except as directed by this section, or by the leave of the Judge, would be void, and the garnishee would be liable to pay the same again for the purpose of satisfying the primary creditor the amount of his claim: see also notes to sections 173 and 180.

Discharge to the garnishee.—The payment by the garnishee under the order of the court satisfies the liability of the garnishee to the primary debtor to the extent of the amount paid, and the primary debtor to such extent ceases to be a creditor of the garnishee: Wardrope v. C. P. Ry. Co., 7 O. R. 321.

Shall be void,—See notes to sections 180 and 189.

191. The garnishee shall not be liable for the costs of Costs. the proceeding, unless and in so far only as occasioned by setting up a defence, which he knew, or ought to have known, was untenable; and, subject to this provision, the costs of all parties shall be in the discretion of the Judge. R. S. O. 1877, c. 47, s. 139.

Costs of the proceeding .- This is only declaratory: "Bank of Montreal v. Yarrington, 3 U. C. L. J. 185. If it becomes necessary to issue execution against the garnishee, he becomes liable for the costs of it, and the bailiff's fees thereon: Rule 61.

Ought to have known was untenable.—Each case must depend on its own circumstances. The reasonableness of any defence set up by the garnishee is to be determined by the Judge, and if in his opinion the defence is such as a reasonable-minded man and one of ordinary intelligence should not have set up, costs would be imposed : see Maxwell on Stats. 101, 104.

192. The Judge in any case brought to garnish a debt, Costs of primary may, in giving judgment on behalf of the primary creditor creditor. award the costs of the proceeding to the primary creditor out of the amount found due from the garnishee to the primary debtor, anything in this Act to the contrary notwithstanding. 43 V. c. 8, s. 65.

In any case brought to garnishee a debt.—See notes to section 173. Award the costs of the proceeding.—Before the year 1880, the Judge had no power to award more than the primary creditor's claim, out of the amount found due from the garnishee to the primary debtor.

Now, if there be enough in the hands of the garnishee to pay the, costs, it may be ordered to be applied in that way.

Sections

Sections 193-195

Summons

193. Judgment shall not be given either against the primary debtor or the garnishee until the said summons and memorandum, with an affidavit of the due service of of particu-both on the proper parties, are filed, unless the Judge for filed. special reasons orders otherwise. R. S. O. 1877, c. 47, s. 140.

> Affidavit of the due service of both.—The affidavit should be entitled in the court and cause, and otherwise be according to Rule 133: see notes to section 105. It should shew that both the garnishee and primary debtor were served and how: see Rule 53 and notes to section 99; see 10 L. J. N. S. 66.

> Otherwise orders.—This provision is probably made in order to provide for a case in which loss of papers or other accident may prevent proof of service in the ordinary way.

No execu-

194. No execution shall in any case issue to levy the tion, till garnisheo's money owing from any garnishee until and so far only as debt due. such money has become fully due. R. S. O. 1877, c. 47, s. 141.

> Money has become fully due .- Independently of this section, the order for payment would not have been granted otherwise: Tapp v. Jones, L. R. 10 Q. B. 591; notes to section 173.

Application to debt from attachment.

195. Any party entitled to or interested in any money or debt attached or bound in the hands of the garnishee by a proceeding under this Act, may, at any time before actual payment thereof by the garnishee, apply to the Judge for an order (which the Judge is hereby authorized to make), to the effect that such money or debt be discharged from the claim of the primary creditor; and thenceforth such money or debt shall cease to be attached or bound for such claim; and such an application and such an order may also be made, if the Judge thinks fit, after the money or debt has been paid over by the garnishee, in which case all parties shall be remitted to their original rights in respect thereto, except as against the garnishee having already paid the debt or money, whose payment shall not be affected thereby, but shall be and remain an effectual discharge to him. R. S. O. 1877, c. 47, s. 142.

Any party entitled to or interested in.—The language of this section is very wide. Should there be several garnishments against the same fund, a second garnishee would have the right to apply under this section to discharge the fund from a previous garnishment proceeding. An

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this section t the same this section eding. An assignee of the debt would also have that right. In fact, any person who made any claim to the money or debt garnished, could take the benefit of 195-196

An order could be made even after the money or debt had been paid over by the garnishee, and the parties could be remitted to their original rights in respect of it, except as against the garnishee who had bona fide paid the money in pursuance of the garnishment proceeding.

It is submitted that the party applying could take advantage only of substantial objections to the attachability of the debt as against him under the garnishment proceedings which it is sought to set aside. He could not rely upon mere irregularities: Macdonald v. Crombie, 2 O. R. 243; 10 A. R. 92; 11 S. C. R. 107; Archbold's Prac. 13th Ed. 1193; but "defences" even though of a kind which would, in other cases, be personal to the primary debtor or garnishee, may be set up under section

At any time before actual payment—"I see no reason why a paymentin goods may not be as good as a payment in money:" per Bolland, B., in Cannan v. Wood, 2 M. & W. 470. "It may be in money or money's worth:" per Parke, B., at p. 469. See, also, Wilkins v. Casey, 7 T. R. 713; Truax v. Dixon, 17 O. R. 366. Or a bank draft: Caine v. Coulton, 1 H. & C. 764. Or cheque: Hopkins v. Ware, L. R. 4 Ex. 268; Norman v. Ricketts, 21 Sol. J. 124. Or by the mere transfer of figures in an account, without any money passing: Eyles v. Ellis, 4 Bing. 112; Bodenham v. Purchas, 2 B. & Ald. 39; Beatty v. Maxwell, 1 P. R. 85; Nightingale v. Bank of Montreal, 26 C. P. 74; Hills v. Mesnard, 10 Q. B. 266. Or by payment to a third person: Waller v. Andrews, 3 M. & W. 312; Bramston v. Robins, 4 Bing. 11; or by accepting an order: Jennings v. Willis, 22 O. R. 439. But a tender is not payment: Bank of New South Wales v. O'Connor, 14 App. Cas. 273. Nor is the mere deduction of an amount from moneys in hand: Re West. Ex parte Clough, (1892), 2 Q. B. 102.

Apply to the Judge for an order.—See Rule 59, as to mode of application.

Order of payment.-The Judge is authorized to make only "such an order," i.e., an order discharging the debt from the claim of the primary

If the money has been paid to the creditor there does not seem to be any power to enforce restitution, except by a new action by the owner against the primary creditor: see Wood v. Dunn, L. R. 2 Q. B. 73.

An effectual discharge to him. - The garnishee paying in obedience to competent legal process is protected: see notes to section 188.

196. (1) If the Judge, on the hearing of a summons security under this Act, or on special application for the purpose, primary thinks proper, he may, before giving judgment against the garnishee, or at any time before actual payment by the garnishee, order such security to be given as may be approved by himself or the clerk, by or on behalf of the primary creditor, for the repayment into court to abide the Judge's order, in case a Judge's order is made for repayment.

Sections 196-197 (2) The bond shall be to the clerk by his name of office, and shall enure for the benefit of all parties interested in or entitled to the money, and may by order of the Judge, and on such terms as to indemnity against costs and otherwise as he may impose, be sued in the name of the clerk of the court for the time being, for the benefit of the party entitled. R. S. O. 1877, c. 47, s. 143.

Security may be ordered.—Should any doubt be raised, either as to the attachability of the debt, or as to the rights of any of the parties, or as to the jurisdiction of the court, the garnishee or any other party may be protected under this section.

It sometimes happens that there is a conflict between two courts. In such a case the rights of the parties may sometimes be settled by appeal: Victoria M. F. Ins. Co. v. Bethune, 1 A. R. 423; or upon interpleader proceedings: Re Anderson and Barber, 13 P. R. 21. And a Judge of a Division Court could, by exercising his powers under this section, while obtaining the money from the garnishee, and thus protecting the creditors and the debtor, require security for the protection of other parties. The security must be ordered either before judgment against the garnishee, or before actual payment by him. For forms of order and bond, see Schedule of Forms.

Sub-section 2.—The security should apparently be by bond, though, it is submitted, the Judge might, in his discretion, order another form of security under sub-section 1.

No order would be made authorizing a suit upon the bond, until there was prima facie evidence produced to the Judge that a breach thereof had been committed, and that the applicant was the proper person to have the bond enforced: Re Young, L. R. 1 P. & D. 186.

The applicant would be entitled, on complying with the Judge's order as to indemnity, to sue upon the bond whenever he pleased; and as he would be the party suing, though in the name of the clerk, there would be no violation of section 88, if the suit were brought in the clerk's own division. The bond, being merely for the repayment of money, is not within 8 & 9 Wm. III. c. 11, s. 8, but is within 4 & 5 Anne, c. 16, and a special summons could, therefore, be issued thereon; and payment of the amount before action, though after the five days limited by the order, would be an effectual bar to the action: Murray v. Earl of Stair, 2 B. & C. 82; Gerrard v. Clowes, (1892), 2 Q. B. 11.

Case of adverse claims, 197. In case any one other than the primary creditor or primary debtor claims to be entitled to the debt owing from the garnishee, by assignment thereof or otherwise, the Judge, when adjudicating in any of the cases aforesaid, or by calling the proper parties before him by summons for the purpose, may enquire into and decide upon the claim, and may allow or give effect to it, or may hold it void as against the primary creditor for being a fraud upon creditors or otherwise, as the justice of the case may require;

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y creditor bbt owing rwise, the presaid, or mons for the claim, it void as upon credy require; and for such purpose he may require the attendance of such parties and witnesses (their conduct money being first paid) as he may think necessary. R. S. O. 1877, c. 47, s. 144.

Adverse claims.—This is a far reaching provision, and under it a great variety of questions may come within the jurisdiction of a Division Court Judge.

His jurisdiction is, however, limited by the amount garnished, and while in adjudicating, he may possibly render a decision which, if correct, will affect property of large value, his decision is effective only to the extent of settling whether the primary creditor is or is not entitled to receive the debt which has been garnished. Re Perras v. Keefer, Q. B. Divl. Ct. 24th. Dec. 1892. For instance, a Division Court Judge has power under this section to decide conflicting questions between parties claiming under garnishee proceedings in his court, and parties claiming under an attachment, under the Act respecting Absconding Debtors, from a county court of another county: Re Moore v. Wallace, 13 P. R. 201.

Questions between conflicting assignees, between creditors and assignees, between the debtor and his assignee, between conflicting creditors, between parties claiming as cestui que trustent, lien-holders and otherwise might have to be disposed of under this section. Even questions in which the title to land arose might have to be decided: Munsie v. McKinley, 15 C. P. 50; Re Sato v. Hubbard, 6 A. R. 546; Cameron v. Allen, 10 P. R. 192.

Express power is given to decide that a claim (sic) is void as being a fraud upon creditors or otherwise. It is submitted, however, that in applying this power, the Judge must first find that the debt sought to be attached was once due to the primary debtor, and that the assignment, or other title upon which the adverse claim is founded, is void. No power is given to set aside transactions prior to the creation of the debt, although the debtor would, but for such transactions, have been entitled to the money. For instance, if land be transferred by A., the debtor, to B., and B. sells to C., no purchase money ever becomes due by C. to A. There never was any privity between them, and there is, therefore, no debt: Vyse v. Brown, 13 Q. B. D. 199; Palmer v. Lovett, 14 P. R. 415.

It is incorrect to speak of a preference as a fraud upon creditors: Wood v. Dixie, 7 Q. B. 892; Holbird v. Anderson, 5 T. R. 235. But it is submitted that under the words "or otherwise," a Judge would have power to decide that a transfer of a debt was void, as a preference, as against the attaching creditor.

An assignee for the benefit of creditors under R. S. O. c. 124, is not entitled to money which has been garnished, even though no order to pay has been made, notwithstanding section 9 of that Act: Wood v. Joselin, 18 A. R. 59.

Absconding debtor.—An attachment issued to the sheriff against the primary debtor, as an absconding debtor, entitles the sheriff to all money in court the proceeds of an attachment: R. S. O. c. 66, s. 16; Re Moore v. Wallace, 13 P. R. 201.

Mechanics' Lien.—Whether a Mechanic's Lien of a sub-contractor takes priority over a garnishee summons against the fund in the hands of the owner, for a debt due by the contractor, is a question of some doubt. There is no reported Canadian decision on the

section question. It is submitted that the lien exists from the commencement of the work under sections 4 and 21, R. S. O. c. 126, and that the registration of the statement of claim, under section 16, is merely to preserve the lien. That being the case, the lien, when duly registered, dates from the commencement of the work by the sub-contractor, and nothing short of a payment to the contractor without notice of the lien of the sub-contractor, will prevent the lien from being effective: see section 9. The attaching creditor is not a purchaser for value: Dallow v. Garrold, 14 Q. B. D. 543, but merely takes what the debtor (the contractor) could himself honestly deal with: Davis v. Freethy, 24 Q. B. D. 519; Beaty v. Hackett, 14 P. R. 395, and cases cited in note to section 173, ante p. 251.

Creditors' Relief Act. -- By the Creditors' Relief Act, R. S. O. 1887, c. 65, s. 37, it is provided:—

(1) Where there are in the sheriff's hands several executions and claims, and there are not, or do not appear to be, sufficient lands or goods, as the case may be, to pay all and his own fees, he may apply for an order attaching any debt owing to the execution debtor by any person resident in the county of such sheriff, whether the debt is owing by such person alone or jointly with another person resident or not resident in such county, and to procure the attachment the sheriff may take the same proceedings as a creditor: and in such case a writ of execution, or other writ in the course of the proceedings, may be directed to him in the same manner as if the attachment were by a creditor; and the proceeds of the debts attached shall be distributed in the same manner as if he had realized the same under execution.

(2) In case the sheriff does not take such proceedings, any person entitled to distribution may take the same for the benefit of himself and all other persons entitled to the distribution as aforesaid, the person owing the attached debt and shall pay the same to the sheriff.

(3) Any judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this Act; payment of such debt shall be made to the sheriff, who in making distribution will apportion to such judgment creditor a share pro rata, according to the amount owing upon his judgment, of the whole amount to be distributed under the provisions of this Act, but such share shall not exceed the amount recovered by the garnishee proceedings unless the judgment creditor has placed a writ in the sheriff's hands.

(4) Money garnished and paid into the sheriff's hands shall be deemed to be money levied under execution, within the meaning of this Act, except that, unless the garnishee proceedings were taken by him, the sheriff shall only be entitled to charge poundage on such moneys at the rate of one and a quarter per cent. 43 V. c. 10, s. 21.

(5) The provisions of sub-sections 3 and 4 of this section shall also apply, as nearly as may be, to any person who attaches a debt in the Division Court before judgment, and to the money so attached.

(6) In case a garnishee, under an order of the court, pays to the attaching creditor, or in case a garnishee, without notice that the sheriff is entitled, pays the amount of his debt into court and the same is paid out to the said creditor, the sheriff may recover from him the amount so received. 48 V. c. 15, s. 1.

It seems clear that these provisions cannot be operative, unless The Creditor's Relief Act has been brought into play either by a levy of the sheriff and an entry thereof in his book or by a garnishment by him where there are several executions in his hands. There are, however, various conditions of facts which create difficulty.

Bection 197

If, prior to the levy of the money by the sheriff, the attachment proceedings have been completed by the judgment against the garnishee and by payment by him to the attaching creditor, the sheriff would have no right to recover the money. If he paid it into court, and it was paid out before such levy, the rights would be the same : see United English and Scottish Assurance Co., Ex parte Hawkins, L. R. 3 Ch. 787. If, however, it had not been paid out, but was in court at the time The Creditor's Relief Act became operative, it could not be said that the right of the attaching creditor to receive the money was at all clear. The judgment against the garnishee did not cause him to be a debtor of the attaching creditor, or to cease to be a debtor of the primary debtor: see Re Combined Weighing and Advertising Machine Co., 43 Ch. D. 99. The debt, therefore, was still, at the time of the levy, the property of the primary debtor, bound only by the garnishment. The companion section 16, of the Absconding Debtor's Act, requires money in court, the proceeds of garnishment proceedings, to be paid to the sheriff for distribution: Re Moore v. Wallace, 13 P. R. 201; and the intention of the Legislature would appear to have been the same with regard to both classes of cases, although in such case, the provisions seem somewhat lame and ambiguous. Full effect can, perhaps, be given to the language of the section by holding that it is applicable to garnishment proceedings which are commenced after the levy and pending the distribution. To this effect was the decision in Traders Bank v. McConnell, 24 L. J. N. S. 87, wherein McDougall, Co. J., held, that sub-section 3 above, applied only to "cases within the Act, or in other words, when the Act, by the entry of the sheriff, has been brought into operation." This decision was, however, founded upon the view that the garnishee summons was an effectual transfer of the debt, following Ex parte Joselyne, 8 Ch. D. 327, but overlooking Chatterton v. Watney, 17 Ch. D. 259; and that part of the reasoning is clearly unsound: Re Combined Weighing and Advertising Machine Co., 43 Ch. D. 99.

Until payment is made, the money remains simply bound by the attachment in the same manner as goods are bound by an execution in the sheriff's hands. It may well be urged that full effect can only be given to the language of the Act by holding that all garnishment proceedings against debtors resident in the bailiwick of the sheriff, which had not been completed by actual payment, before levy by the sheriff under the Act, are affected by the provisions here set out, and that payment must be made by the garnishee to the sheriff. The sheriff does not take adversely to, but under the garnishment proceedings.

Care should be taken, in this event, to have the costs of the proceeding awarded out of the amount found due by the garnishee: see section 192, as otherwise the primary creditor would have to bear the costs while the other creditors would profit by his efforts: see remarks in Wood v. Joselin, 18 A. R. 59.

It will be observed, that the sheriff has no right to take attachment proceedings against persons not resident in his county. Sub-section 2 evidently refers to debts owing which might have been attached by the sheriff, but sub-section 3 is not clear upon this point. As the payment is to be made by the sheriff, it is submitted, however, that it is to the sheriff of the county in which the garnishee resides, and only when that sheriff has brought the debt within the Act by having made a levy.

Adjudication on claims.—If all parties who are suggested, or who appear to have any interest in the debt, are before the court at the original hearing, the Judge may adjudicate upon the rights of the third parties at that time. If any party is not before the court it will be necessary for a summons to issue to bring him before the court.

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For form of summons, see Forms. Where a debtor is being harassed by garnishment proceedings, and also by other conflicting claims, he may move for an interpleader order: R. S. O. c. 44, s. 53, s.s. 5; Reading v. School Board for London, 16 Q. B. D. 686; McElheran v. London Masonic Ben. Assn. 11 P. R. 181.

If he has been sued in the High Court, his proper practice is to move in that court, under C. R. 1141.

It was held in Re Anderson and Barber, 13 P. R. 21, that where he was sued in a county court, he could not move in that action: but see, Re Gould v. Hope, 12 C. L. T. 167; 21 O. R. 624.

For form of order, see Forms.

Judge may postpone or adjourn proceedings.

198. The Judge may postpone or adjourn from time to time, the hearing and other proceedings in garnishee cases, to allow time for giving omitted notices of defence, or to produce further evidence, or for any other purpose; and may require service on, and notice to, other or additional parties, and may prescribe and devise forms for any proceeding, and may amend all summonses, memoranda, claims, accounts, notices and other papers and proceedings, and copies thereof as justice may require. R. S. O. 1877, c. 47, s. 145.

Adjourn from time to time.—As often as he pleases: Neilson v. Jarvis, 13 C. P. 176; Re Sutton Coldfield Gram. School, 7 App. Cas. 91; Whitehouse v. Wolverhampton Ry. Co., L. R. 5 Ex. 6.

The Judge has in Division Court proceedings general " v cy full powers in regard to adjournment of cases and the am-. of proascretion is ceedings, but in these garnishee cases more than ordin conferred by this section, even to the granting of new. als after the expiration of 14 days if justice requires it: McLean v. McLeod, 5 P. R.

It may be said that the power of the Judge under this section is only limited by his proper discretion and the requirements of justice.

Debt attach-

199. The Clerks of the several Division Courts shall ment book keep in their respective offices a debt attachment book, according to the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, in which shall be correctly entered the names of parties, the dates, statements, amounts and other proceedings under this Act, as indicated by the said form, and copies of any entries made therein may be taken by any one on application free of charge. R. S. O, 1877, c. 47, 8, 146,

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Shall be correctly entered .- The names of all parties and other particulars should be entered exactly as in the suit: see Form 6.

The words used are imperative. The clerks "shall keep in their offices the prescribed books, and the entries shall be correctly entered in

Entries made therein may be taken by any one.—Upon proof that a copy of any entry was an examined copy or extract, or that it purported to be signed and certified as a true copy or extract, by the clerk, the copy would be receivable in evidence: R. S. O. c. 61, s. 25; but compare section 45, ante, p. 87.

ARBITRATION.

200. The Judge may, in any case, with the consent of Reference both parties to the action, or of their agents, order the same, order of with or without other matters in dispute between such by conparties, being within the jurisdiction of the court, to be referred to arbitration to such person or persons, and in such manner and on such terms as he thinks reasonable and just; or the parties to an action, may by writing, signed by themselves or their agents, agree to refer the matters in dispute to the arbitrament of a person named in the agreement, which shall be filed with the clerk, and be entered on the Procedure Book as notices are entered. R. S. O. 1877, c. 47, s. 147; 49 V. c. 15, s. 13.

Arbitration.—Parties cannot be compelled to arbitrate. When the Judge orders the arbitration the consent of the parties or their agents need not be in writing, and in this case, also, the reference may include matters not covered by the action itself, so long as the jurisdiction of the court is not exceeded. The Judge may impose terms, and may, therefore, limit the time within which the award may be made.

If one of the parties should be a corporation, and no order be applied for, the consent might be either under the corporate seal or the hand of its agent. If a solicitor consented on behalf of the corporation, his retainer need not be under seal: Faveiell v. Eastern Counties Ry. Co., 2 Ex. 344. Counsel has power to consent: Wilson v. Corp. of Huron and Bruce, 11 C. P. 548, even against the wish of the chief witness, unless his dissent is communicated to the opposite party: Strauss v. Francis, L. R. 1 Q. B. 379.

Trustees and executors may submit to arbitration: R. S. O. c 110,

If an action of replevin be referred without the consent of the sureties, they will be discharged: Burke v. Glover, 21 U. C. R. 294.

The better opinion is, that idiots, lunatics, infants, married women, persons attainted and excommunicated may be arbitrators, if agreed to by the parties: Russell, 111.

The parties on the record, though they are merely nominal parties, must consent: Owen v. Hurd, 2 T. R. 643. Where a third party, who had agreed to join in a submission of a suit, refused to proceed in the

Sections 199-200

Section 200

reference, the submission was set aside on the application of one of the parties on the record: Bacon v. Creswell, 1 Hodges, 189.

When nothing is said about costs, the arbitrator has implied authority to adjudicate respecting the costs of the cause, but not of the reference or award: Russell 377 Re Harding and Wren, 4 O. R. 605; but see Macdonell v. Baird, 13 P. R. 331, wherein it was held that the arbitrator had no power in such cases over costs. But if there be an express power given to the arbitrator over costs, and a fortiori over the costs of the reference, the arbitrator may deal with the costs of the reference and award: Russell 377.

If the costs are to abide the event, the arbitrator cannot make any disposition of them: Devanney v. Dorr, 4 O. R. 206; see Hawke v. Brear, 14 Q. B. D. 841.

The arbitrator need not, unless he please, give any direction respecting costs. The costs of the action, at least, will then abide the event: Russell, 383; Munster v. Cox, 10 App. Cas. 684.

An arbitration is a judical inquiry to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses: Re Hopper, L. R. 2 Q. B. 373.

The arbitrator should decline to receive private communications from either litigant respecting the subject matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side. Russell, 654; see Conmee v. C. P. Ry. Co., 16 O. R. 639, 654.

No witness should be examined, except in the presence of both parties: Russell, 191-195; Cruickshank v. Corbey, 5 A. R. 415; Whitely v. MacMahen, 32 C. P. 453; Race v. Anderson, 14 A. R. 213; Re Ferris & Eyre, 18 O. R. 395.

Parties may, however, waive the irregularity by not objecting, or by attending, without objection, meetings held after knowledge of the irregularity: Russell, 196.

The arbitrator may proceed ex parte if he have given notice of his his intention so to do, in the event of either party not attending. Making an appointment "peremptory," is sufficient: Russell, 198.

An arbitrator is not bound by the rules of evidence, and his failure to observe them is no ground for setting aside the award: Russell, 199-201; Webster v. Haggart, 9 O. R. 27; Lemay v. McRae, 16 O. R. 307; 16 A. R. 348; 18 S. C. R. 280; Re Keighley. Maxstead & Co., and Bryan, Durant & Co., 9 T. L. R. 107.

It will be noticed that when the arbitration is directed by order of the Judge, that more than one person may be appointed. But when the arbitration is to be carried on merely under a written consent filed with the clerk, only one arbitrator is contemplated. There does not appear to be room, in either case, for the choice of an umpire or other arbitrator: but see Form $35\ (a)$.

The arbitrator must be named in the order or consent.

Where more than one arbitrator is appointed, all must concur in the award, or have an opportunity of concurring. Those who are to be affected by it have a right to the united judgment of all up the very last moment.

The fact of a joint execution by two, although good if the third finally refused to join, (Freeman v. Ontario & Quebec Ry. Co., 20 L. J. N. S.

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201. The reference shall not be revocable by either Revocation of referparty, except with the consent of the Judge, R. S. O. 1877, ence. c. 47, s. 148.

Leave was given to revoke a submission, where an arbitrator was going wrong in a point of law, even in a matter within his jurisdiction: East and West India Dock Co. v. Kirk, 12 App. Cas. 738. This case was, however, one of a very exceptional character, and lays down no general rule. The power to grant leave to revoke is a matter of discretion: James v. James, 22 Q. B. D. 669; 23 Q. B. D. 12.

If an arbitrator has received evidence behind the back of a party, leave to revoke would be granted: Russell, 159, 160.

Where an arbitrator has wrongly rejected admissible evidence, the court will not give leave to revoke, if satisfied that the arbitrator will, on hearing the opinion of the court, receive the evidence: Robinson v. Davies, 5 Q. B. D. 26.

Where new circumstances have arisen since the submission, of such a kind as to make it probable that the arbitrator would have a bias, the discretion of the court will be exercised: Re Baring & Doulton, 8 T. L. R. 701; Conmee v. C. P. Ry. Co., 16 O. R. 639. The arbitrator must have an open mind: Jackson v. Barry Ry. Co., 9 T. L. R. 90.

Death of one of the parties, before award, revokes the submission: Tyler v. Jones, 3 B. & C. 144; unless the submission provides the contrary: McDougal v. Robertson, 4 Bing. 435; Re Curry, 12 P. R. 437; but the death of one of several parties on the same side, where interests are identical, will not revoke the submission: Re Hare & Milne, 6 Bing. N. C. 158; but where their interests are separate, it will be revoked as to the deceased: Russell, 168; Re Potter & Knapp, 6 L. J. N. S. 125; Re Lawson v. Hutchinson, 19 Gr. 84.

A probability that the arbitrators will give more than one party considers right, is no ground for revocation: G. W. Ry. Co. v. Miller, 12 U. C. R. 654. But if they are about to allow improper charges, application may be made for leave to revoke: Carveth v. Fortune, 12 C. P. 504.

A submission cannot be revoked, except by consent, after award made: Phipps v. Ingram, 3 Dowl. 669; Lemay v. McRae, 16 O. R. 307: 16 A. R. 348: 18 S. C. R. 280; see section 203, infra.

202. The award of the arbitrator or arbitrators or Award to be entered umpire shall be entered as the judgment in the cause, and as the judgment. shall be as binding and effectual as if given by the Judge. R. S. O. 1877, c. 47, s. 149.

The award must be made within the time limited by the order or consent, otherwise the authority of the arbitrator would be gone; Denton v. Strong, L. R. 9 Q. B. 117. Power might, however, be given to the arbitrator to enlarge the time, or the lapse of time might be waived by appearing on the arbitration without objection: Thurlow v. Sidney, 29

If no power existed to enlarge the time, and the objection was not waived, the action would still remain untried and the court could either

Section try it, or on consent, direct a new arbitration. When power is given to enlarge the time, the enlargement should be made during the original period, unless a special power be given to enlarge afterwards: Russell, 143. The court would have no power, without consent, to enlarge the time: Russell, 149: section 43, R. S. O. c. 53, would not be applicable to Division Courts.

> An arbitrator cannot be compelled to make an award: Russell, 203. The arbitrator may consult men of science in every department where it becomes necessary: Caledonian Ry. Co. v. Lockhart, 3 Macq. 808. A valuer may be consulted: Emery v. Wase, 5 Ves. 846; Gray v. Wilson, L. R. 1 C. P. 50; or a solicitor: Proctor v. Williams, 8 C. B. N. S. 386; or an accountant; Re Tidswell, 33 Beav. 213.

> Any words expressing a decision is an award. There need be no recitals: Russell, 246. It must finally decide all matters in difference in the suit. Any sum found to be due may be ordered to be paid by instalments, and in default of payment of one, the whole may be ordered to become due. The arbitrator cannot delegate any part of his authority to another, nor reserve any future power to himself. Nor can he order an act to be done to the satisfaction of another. But a mere ministerial act may be reserved to be done either by himself or a stranger-e.g., to make measurements or to settle the form of a bond or release: Russell, 281.

> The award must be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties: Russell, 206; Mitchell v. G. W. Ry. Co., 38 U. C. R. 471.

> It is said that a direction to pay the costs of a action in an inferior court, without ascertaining the amount, is void for uncertainty: Addison v. Gray, 2 Wils. 293; Winter v. Garlick, 1 Salk. 75.

But if the direction should be to pay the costs taxed by the clerk of the Division Court, it would probably be good: Higgins v. Willes, 3 M. & R. 382; Hopcraft v. Hickman, 2 S. & S. 130; see Re Preble and Robinson, (1892), 2 Q. B. 602.

The award must be mutual, i.e., if payment is directed to be made by one party, it must destroy his obligation to the other: Russell, 296.

It must be possible, intelligible and consistent.

An affidavit of execution must accompany it: Rule 150.

The arbitrator may retain the award until his fees are paid: Russell, 251. The amount of fees is regulated by R. S. O. c. 53, ss. 20, 21.

Travelling expenses of the arbitrators cannot be allowed in addition: Re Hillyard & Royal Ins. Co., 12 P. R. 285.

Until taxation of his fees the arbitrator cannot maintain an action therefor: McKillop v. Logan, 7 C. L. T. 171; but see Crampton v. Ridley, 20 Q. B. D. 48, where a right to sue for fees was held to exist at common law.

No action will lie to recover back the fees paid to arbitrators for an invalid award: Nott v. Gordon, 20 L. J. N. S. 379.

Where the costs of the arbitration are not provided for by the submission, each party should pay one-half the arbitrators fees: Smith v. Fleming, 12 P. R. 520, 657; Re Harding and Wren, 4 O. R. 605.

The award is as binding and effectual as if given by the Judge. It istherefore, subject to an application for a new trial.

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203. The Judge, on application to him within fourteen sections days after the entry of the award, may, if he thinks fit, Judge may set aside the award, or may, with the consent of both parties, set aside award. revoke the reference and order another reference to be made in the manner aforesaid. R. S. O. 1877, c. 47, s. 150.

By R. S. O. c. 53, s. 30, it is provided that after taxation the arbitrator may maintain an action against all the parties to the reference jointly or severally.

This section gives an extended discretionary power to the Judge, and the numerous authorities governing motions to set aside an award are inapplicable except as guides to the Judge in exercising his discretion.

The grounds usually urged in moving to set aside an award are: misconduct or corruption on the part of the arbitrator; or the improper reception of evidence behind the back of the parties; or mistake admitted by the arbitrator, or apparent on the face of the award.

The award may also be set aside on account of its lacking the requisites enumerated in note to section 202, or for excess of authority by the arbitrator: Russell, 652-697.

The fact that an award is contrary to law or evidence, is ordinarily no ground for setting it aside. The arbitrator has full power to decide contrary to law or evidence if he pleases, but if he intends to decide according to law, and makes a mistake, and such mistake is apparent on the face of the award, or is admitted by the arbitrator, the award may be set aside: Russell, 303-310; McRae v. Lemay, 18 S. C. R. 280.

Under this section, the Judge may, however, set aside the award if contrary to law or evidence: or if, in his opinion, it does not do substantial justice, or for any other reason.

The Judge may set aside the award on the ground that facts not admissible in a court of law had since been discovered, which might alter the decision: Re Keighley, Maxstead & Co., and Bryan, Durant & Co., 9 T. L. R. 107.

An award made by arbitrators, one of whom was, at the time of the arbitration, a sub-agent for an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was held void: Vineberg v. Guardian Fire and Life Assce. Co., 19 A. R. 293.

The time for moving does not expire until 14 days from the entry of the award as a judgment in the cause.

204. Any of the arbitrators may administer an oath or Arbitrators may also affirmation to the parties, and to all other persons examined administer oaths. before such arbitrator. R. S. O. 1877, c. 47, s. 151.

It is left to the option of the arbitrator whether he will examine the witnesses on oath or not. He cannot be compelled to so examine them, though one of the parties may require them sworn: Smith v. Goff, 3 D. &. L. 47.

The sending of adulterated samples to be used on an arbitration, though not in fact so used, is a misdemeanor: R. v. Vreones (1891), 1 Q. B. 860.

Section 205

CONFESSIONS OF DEBT.

Clerks and bailiffs may take confessions.

205. A bailiff or clerk, before or after action commenced, may take a confession or acknowledgment of debt from a debtor or defendant desirous of executing the same, which confession or acknowledgment shall be in writing and witnessed by the bailiff or clerk at the time of the taking thereof; and upon the production of the confession or acknowledgment to the Judge, and its being proved by the oath of the bailiff or Clerk, judgment may be entered thereon. R. S. O. 1877, c. 47, s. 152.

May take a confession.—When taken before suit commenced, particulars of claim as full as are required for special summons must be shewn by the confession, or attached to it: Rule 131; section 109; Rule 3.

Where some of the defendants served with a special summons confess and others do not, as to the duty of the clerk, see Rule 26.

And where some served with a special summons do not defend and others do, those not defending are taken to have *confessed* the plaintiff's claim: Rule 24.

If a defendant served with a special summons does not file a disputing notice but gives a confession, the plaintiff can elect to take proceedings on the confession or otherwise: Rule 30.

As to the form of a confession after suit, see form 104. There is no form of confess on before suit, but the above can easily be adapted. One partner cannot give a confession for the firm without special authority: Huff v. Cameron, 1 P. R. 255; Hambidge v. De La Crouée, 3 C. B. 742; but if the non-executing partner comes to know of it, and allows proceedings to be taken upon it, and delays for eighteen months before applying to set it aside, a judgment upon it will not be disturbed: Brown v. Cinquars, 2 P. R. 205. A confession could be given by the Attorney of the defendant: Richmond v. Proctor, 3 U. C. L. J. 202; but he had better attach his authority to the confession. One of several executors has no power to bind the others by giving a confession: Commercial Bank of Canada v. Woodruff, 21 U. C. R. 602. A plaintiff giving time for a debt may take confession as additional security: Parker v. Roberts, 3 U. C. R. 114; Potter v. Pickle, 2 P. R. 391. There should be an affidavit of execution, (form 108); but where judgment is entered, on a confession without affidavit, it would not be set aside, but the affidavit would be allowed to be filed afterwards: Potter v. Pickle, 2 P. R. 391. A confession given by the maker of a note payable immediately is no defence to an action against the endorser: Bank of Montreal v. Douglas, 17 U. C. R. 208. If one of two defendants dies after confession and before judgment, leave would be given to enter judgment against the survivor: Nichall v. Cartwright, Tay, 464; see letter at page 313 of 7 U. C. L. J. on Confession.

At the time of taking thereof.—The confession or acknowledgment executed in any other form than here prescribed would operate as an admission of the party of the contents of the instrument, but could not properly be acted upon as a confession. The general opinion is that a

confession in the Division Court has not the effect that the same instrument would have under chapter 124 of the R. S. O.

No one but a clerk or bailiff appears to have the right to take the confession.

206. The oath or affidavit shall state that the party Affidavit required in making it has not received, and that he will not receive, such cases. anything from the plaintiff or defendant, or any other person, except his lawful fees, for taking the confession or acknowledgment, and that he has no interest in the demand sought to be recovered. R. S. O. 1877, c. 47, s. 153.

No interest in the demand .- It is intended here to make the officer who takes the confession perfectly independent, so far as the oath can make him; and as neither clerks nor bailiffs can sue in their own court, neither should they have any "interest" in the suits of others.

COSTS.

207. (1) The costs of any action or proceeding not Judge's authority otherwise provided for, shall be paid by or apportioned as to costs. between the parties in such manner as the Judge thinks fit, and in cases where the plaintiff does not appear in person or by some person in his behalf, or appearing does not make proof of his demand to the satisfaction of the Judge, he may award to the defendant such costs and such further sum of money, by way of satisfaction for his trouble and attendance as he thinks proper, to be recovered as provided for in other cases under this Act, and in default of any special direction, the costs shall abide the event of the action, and execution may issue for the recovery thereof in like manner as for any debt adjudged in the court. R. S. O. 1877, c. 47, s. 154.

(2) In all actions or other proceedings brought in a Division Court in which the plaintiff fails to recover judgment by reason of the Court having no jurisdiction over the subject matter thereof, the Judge presiding in the Court shall have jurisdiction over the costs of the action or other proceeding, and may order by and to whom the same shall be paid, and the recovery of the costs awarded to be paid may be enforced by the same remedies as the costs in actions or proceedings within the proper competence of the Court are recoverable. 44 V. c. 5, Rule 489.

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As the Judge thinks fit.—A very wide discretion is here given to the Judge on the subject of costs, but it only applies to cases where no special provision is otherwise made. It would not apply to such cases as are provided for under section 124 and others of a similar nature.

The event is to be taken distributively. If the plaintiff recover as to some items of the claim, and the defendant as to others, the plaintiff is entitled to the general costs of the suit, and the other costs—e.g., witness fees, will be payable to the party who has succeeded upon the issue in respect of which they were incurred: Myers v. Defries, 4 Ex. D. 180; Stooke v. Taylor, 5 Q. B. D. 569; Hawke v. Brear, 14 Q. B. D. 841.

Formerly it was decided that where a Judge had no jurisdiction, he had no power to award costs: Lawford v. Partridge, 1 H. & N. 621; Peacock v. The Queen, 4 C. B. N. S. 264; Powley v. Whitehead, 16 U. C. R. 589; Campbell v. Davidson, 19 U. C. R. 222; Nicholls v. Lundy, 16 C. P. 160; In re Kingston Election, Stewart v. Macdonald, 41 U. C. R. p. 313; Brown v. Shaw, 1 Ex. D. 425; though the authorities to that effect were disregarded in Great Northern Committee v. Inett, 2 Q. B. D. 284.

This provision is intended to remove any doubts which existed as to the right of a Judge to award costs against the plaintiff in such cases.

Counsel fees. 208. Where in a contested case for more than \$100, a counsel, solicitor or agent has been employed by the successful party in the conduct of the cause or defence, the Judge may, in his discretion, direct a fee of \$5, to be increased according to the difficulty and importance of the case, to a sum not exceeding \$10, to be taxed to the successful party, and the same, when so allowed, shall be taxed by the clerk and added to the other costs. 43 V. c. 8, s. 16.

In a contested case.—This section is extended to interpleader cases by section 155, sub-section 2.

It has been argued by some that the words "contested case" mean not only a case in which there is a contest in court, but one in which notice of defence has been entered simply. The writer has always thought otherwise, and when we consider that, since the year 1880, a clause was introduced in one of the Division Court Bills before the Legislature, allowing the Judge, in his discretion, to grant what may be termed counsel fees in all cases within this section in which a defence was entered, and the Legislature refused to pass it, there cannot be much doubt of their intention under this section. It was intended to obviate the difficulty which the writer and other Judges had held in regard to the meaning of these words. It is true that in many cases it may be said there is a contest, although the party may not appear in court, yet we still think the statute was not intended to meet such cases. There is great force in the argument that in preparing the case for trial the fee is virtually earned whether the defendant appears at the trial or not; but we think it must be addressed to the Legislature, rather than to the right of the Judge, to allow a fee.

For form of flat where a fee is allowed, see Schedule of Forms, post.

Solicitor or agent.—The fee here given is not confined to a counsel or solicitor, but may be allowed to an "agent" as well: see notes to section 120.

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Shall be taxed by the Clerk.—The clerk's duty is simply a ministerial Sections one, which he is bound to execute, the responsibility of the order being improperly granted resting with the Judge: Andrews v. Marris, 1 Q. B. 3; Graham v. Smart, 18 U. C. R. 482; Hill v. Managers of Met. Asylum Dist., 4 Q. B. D. pp. 440, 441.

The discretion conferred upon the Judge under this section should be exercised according to the principles laid down in Julius v. Oxford, (Bishop), 5 App. Cas. 214, and other cases cited in note to section 8 ante, p. 5.

209. Where the defendant having disputed the plain-Costs of tiff's claim afterwards and before the opening of the court in certain confesses judgment or pays the claim so short a time before the sitting of the court that the plaintiff cannot in the ordinary way be notified thereof, and without such notice the plaintiff bona fide and reasonably incurs expenses in procuring witnesses or in attending at court, the Judge may, in his discretion, order the defendant to pay such costs or such portion thereof as to him may seem just. 43 V. c. 8, s. 63.

Confesses judgment.—As to when the defendant may confess judgment, sec section 205 and notes thereto.

Notified thereof.—It is the duty of the clerk forthwith to notify any party for whom he may receive money by virtue of his office: section 294; Rule 95.

Reasonably incurs.—What is reasonable must always be a fact to be determined by the Judge, and must be decided with reference to the circumstances of each particular case.

See Rule 138.

210. No costs shall be recoverable in an action brought Costs in actions on in any Court for the recovery of a sum awarded by judg-judgments. ment in a Division Court without the order of the Judge of the Court in which the action is brought, on sufficient cause shewn. R. S. O. 1877, c. 47, s. 216.

This is apparently a direction applicable to all courts. It is doubtful whether an action can be brought upon a Division Court judgment in any other court than a Division Court: McPherson v. Forrester, 11 U. C. R. 362; Donnelly v. Stewart, 25 U. C. R. 398. After these cases. were decided, judgments of Division Courts were declared to have the. same force and effect as judgments of Courts of Record: 32 V. c. 23, s. 1. See section 7.

On sufficient cause shewn.—As there can be no adverse order for costs, unless expressly authorized by statute, we submit that an order under this section could not be made except where the opposite party had an opportunity of being heard: see Lomax v. Berry, 2 H. & N. p. 128, per Martin, B.; McLean v. Allen, 14 P. R. 84, 291.

Sections 211-213

PROCEEDINGS NOT TO BE SET ASIDE FOR MATTER OF FORM.

Proceedings not to be quashed had or made concerning any matter or thing under this form.

Act, shall be quashed or vacated for any matter of form.

R. S. O. 1877, c. 47, s. 155.

Matter of form.—Though an adjudication be informal, it will be upheld if it be a substantial decision of the cause: Oliphant v. Leslie, 24 U. C. R 398; see also, Crawford v. Beattie, 39 U. C. R. 28.

For instances of formal defects, see Ex parte Vanderlinden, 20 Ch. D. 289; Ex parte Johnson, 25 Ch. D. 112; but, see Ex parte Tindall, 6 DeG. M. & W. 741: McMurray v. Northern Ry. Co., 22 Gr. 476.

JUDGMENT AND EXECUTION.

When money not paid, pursuant to order execution to issue.

ment of money, and in case of default of payment of the whole or of any part thereof, the party in whose favour the order has been made, may sue out execution against the goods and chattels of the party in default; and thereupon the clerk, at the request of the party prosecuting the order, shall issue under the seal of the court an execution to one of the bailiffs of the court, who by virtue thereof shall levy by distress and sale of the goods and chattels of such party, being within the county within which the court was holden, such sum of money and costs (together with interest thereon from the date of the entry of the judgment) as have been so ordered, and remain due, and shall pay the same over to the said clerk. R. S. O. 1877, c. 47, s. 156.

Judgment—Unless otherwise ordered, no execution shall issue within fifteen days from entering the judgment given after trial: 52 V. c. 12, s. 16; see section 145.

By a judgment is here meant that final determination of a cause which concludes the parties and privies to it, and prevents the subject being again litigated, either in the Division Court or in any other: Gibbs v. Cruikshank, L. R. 8 C. P. 454; Flitters v. Allfrey, L. R. 10 C. P. 29; Austin v. Mills, 9 Ex. 288; Dover v. Child, 1 Ex. D. 172; Bullock v. Dunlap, 2 Ex. D. 43; see note to section 7 ante, p. 3.

So long as a judgment stands, if regularly entered, or proceedings duly taken, it estops either party from denying its correctness, or the execution founded upon it: Huffer v. Allen, L. R. 2 Ex. 15; Ventriss v. Brown,

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ceedings duly or the execuiss v. Brown, 22 C. P. 345; but if obtained by covin—i.e., secret conspiracy or agreement between two or more persons to injure or defraud another—and collusion, it is no bar, and does not affect third parties: Girdlestone v. Brighton Aquarium Co., 3 Ex. D. 137; 4 Ex. D. 107.

To conclude a plaintiff by estoppel as to what defendant did in a previous action, it must appear that there was a judgment of the court on the question: Stanton v. Styles, 1 L. M. & P. 575.

A judgment of a Division Court would be aided against the equitable estate of the debtor: Bennett v. Powell, 3 Drew. 326; see notes to section 73.

A Judge, at the time, has power to order a judgment given by him to be paid by instalments: Robinson v. Gell, 12 C. B. 191; but not so as to postpone execution longer than 50 days from the service of the summons unless under special circumstances: section 147.

A judgment of a Division Court is not removable into a Superior Court for the purpose of issuing execution thereon: Moreton v. Holt, 10 Ex. 707.

A verbal order of the Judge sitting in court is a "judgment" of the court, and can be acted upon Eli v. Moule, 5 Ex. 918.

See, also, notes to sections 109, 111, 145, 146 and 147.

Execution.—Execution may be issued on a judgment by default on a specially indorsed summons immediately after the entry of the judgment: section 109; but in other cases, unless the Judge otherwise orders, the execution shall not issue until 15 days after the entry of the judgment: section 145.

An execution cannot issue in the name of a plaintiff's executor without revival: Proctor v. Jarvis, 15 U. C. R. 187: but if issued can be executed after the death of the plaintiff or defendant: Rolt v. Gravesend (Mayor, etc.), 7 C. B. 777; Turner v. Patterson, 13 C. P. 412; Johnston v. McKenna, 3 P. R. 229; even if goods in the hands of the executor: Smith v. Bernie, 10 C. P. 248.

Executions should not be issued by the clerk without an express order from the party entitled to it: 4 U. C. L. J. 203, 251; Tuckett v. Eaton, 6 O. R. 486; or where from a course of business the authorization can be reasonably inferred.

"Execution" sometimes means the writ itself, and sometimes what is done under it: McDonald v. Cleland, 6 P. R. 293.

"Levying on execution sometimes means seizure and sale: Ross v. Grange, 25 U. C. R. 396; Buchanan v. Frank, 15 C. P. 198; or receipt of money, Traders' Bank v. McConnell, 24 L. J. N. S. 87.

The endorsement of execution for a larger amount than is actually due is not per se an injury to the defendant; it must be shewn that more goods were seized than were necessary or reasonable to satisfy what was really due, and that the acts complained of were done maliciously and without reasonable or probable cause: Barber v. Daniell, 12 C. P. 68; Saxon v. Castle, 6 A. & E. 652; Tancred v. Leyland, 16 Q. B. 669; Churchill v. Siggers, 3 E. & B. 937.

But an allegation and proof in a similar case that execution was issued wrongfully and maliciously, and without reasonable or probable cause, will support an action for the injury: Dewar v. Carrique, 14 C. P. 137; Gilding v. Eyre, 10 C. B. N. S. 592.

If the defendant pay the debt, he should notify the clerk thereof: Tuckett v. Eaton, 6 O. R. 486.

Executions should be executed in the order in which the bailiff receives them: 4 U. C. L. J. 251.

Section 212

Whether several executions against the same person are delivered into the bailiff's hands at one time, or he receives them by post, that execution should be first executed which the bailiff first sees. Seizure should be made and money paid over according to their priority: Hazlett v. Hall, 24 U. C. R. at p. 486; Rowe v. Jarvis, 13 C. P. 495; Bank of Montreal v. Munroe, 23 U. C. R. 414; Dennis v. Whetham, L. R. 9 Q. B. 345.

Where a sheriff went to defendant's house with an execution, and merely produced the warrant, at the same time demanding debt, costs and poundage, which were paid under protest, it was held not to amount to a seizure so as to entitle the sheriff to poundage: Nash v. Dickenson, L. R. 2 C. P. 252.

But where a sheriff's officer went with another man to defendant's house, shewed him the warrant and demanded payment, and told him that in default of payment the man must remain in possession and further proceedings would be taken, the defendant then paid the sum demanded in the warrant, which included poundage and officer's fees, it was held there had been a seizure which entitled the sheriff to poundage: Bissicks v. Bath Colliery Co., 3 Ex. D. 174.

See Lee v. Dangar, (1892), 1 Q. B. 231, 241, 242; Craig v. Craig, 7 P. R. 209; Cropper v. Warner, 1 Cab. & E. 152.

Seizure is the forcible taking of possession: Johnston v. Hogg, 10 Q. B. D. 432; see, also, Gladstone v. Padwick, L. R. 6 Ex. 203; Gibbons v. Farwell, 34 Alb. L. J. 497, and cases there cited; May v. Standard Fire Ins. Co., 5 A. R. 605; Craig v. Craig, 7 P. R. 209; Cropper v. Warner, 1 Cab. & E. 152.

Seizure of part of the goods in a house in the name of the whole is good seizure of all: Cole v. Davis, 1 Ld. Raymd. 724.

If in an execution and the endorsements the names of the plaintiffs and defendants are transposed throughout, it is clearly irregular: Davidson v. Grange, 5 P. R. 258.

An execution from a Division Court only binds goods from the time of seizure: Culloden v. McDowell, 17 U. C. R. 359; per Burns, J.; Watts v. Howell, 21 U. C. R. at p. 259.

Moneys, securities for money and choses in action, are only bound from the time of actual seizure either by sheriff or bailiff: McDowell v. McDowell, 10 U. C. L. J. 48.

A bailiff could not seize or sell the equity of redemption in a vessel: Scott v. Carveth, 20 U. C. R. 430.

Money paid into court is not liable to seizure under execution while in the hands of the officer of the court: Calverly v. Smith, 3 U. C. L. J. 67; 4 U. C. L. J. 177; but it is submitted that a mortgage on real estate is: 5 U. C. L. J. 249.

Fixtures in defendant's house cannot be sold under execution: Winn v. Ingilby, 5 B. & Ald. 625; Rogers v. Ontario Bank, 21 O. R. 416; nor where fixtures have been wrongfully severed by a tenant: Farrant v. Thompson, 5 B. & Ald. 826.

Tenants' fixtures may, however, be removed: Grymes v. Bowern, 6 Bing. 437.

Growing crops may be seized: McDougall v. Waddell, 28 C. P. 191.

Under an execution against the chattels of a mortgagor, the bailiff can seize the *corpus* of the mortgaged goods, so that he may expose them to view, although he can sell only the equity of redemption in them; see Smith v. Cobourg & Peterboro' Ry. Co., 3 P. R. 113.

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But not where goods are in possession of the mortgagee: Watson v. Section Henderson, 25 C. P. 562; Squair v. Fortune, 18 U. C. R. 547.

On an execution against one of two partners, the defendant's interest in the goods of the partnership can be seized; but the right of property or possession of the other partner cannot be interfered with: Owens v. Bull, 1 A. R. 62; Harrison v. Harrison, 14 P. R. 436; McDonagh v. Jephson, 16 A. R. 107; and the purchaser would take the interest of the execution defendant as tenant-in-common of the goods: Eddie v. Davidson 2 Doug. 650; Partridge v. McIntosh, 1 3: 50; Wilson v. Vogt, 24 U. C. R. 685.

But the partner's interest in the good-will, or book debts, or other things incapable of seizure could not be sold: Helmore v. Smith, 35 Ch. D. 436. "The unfortunate purchaser from the bailiff has to find out what he has really had assigned to him, and that he can only do by a partnership account:" per Lindley, L.J., 85 Ch. D. 447.

An execution against a partner has no priority against his separate property over one against him as a member of a partnership: Bank of Toronto v. Hall, 6 O. R. 653.

Book debts cannot be seized under section 228: McNaughton v. Webster, 6 U. C. L. J. 17.

A license to sell liquor could not be sold under an execution: Re Gilmer, 17 L. R. Ir. 1; nor a term of years: Duggan v. Kitson, 20 U. C. R. 316.

Money made under an execution at the suit of one man cannot be be retained by the bailiff to meet another execution in his hands against the same man: Sharpe v. Leitch, 2 L. J. N. S. 132; Wood v. Wood, 12 L. J. Q. B. 141.

Farm stock transferred by A. to B. on the terms that A. should be repaid by a greater specified number of the same kind at a certain time, would, as well as the increase, be liable to seizure under an execution against B. placed in the bailiff's hands before the specified time expired: see Peers v. Carrall, 19 U. C. R. 229; South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101; Oliver v. Newhouse, 32 C. P. 90; 8 A. R. 122.

Such a case is nothing less than a sale: see South Australia Ins. Co. v. Randell, L. R. 3 P. C. at p. 109; Ex parte White. In re Nevill, L. R. 6 Ch. 397.

But if merely lent this would not be so: Dillaree v. Doyle, 43 U.C. R.

If a person buy an article from a tradesman, and afterwards see another article of the same kind belonging to the tradesman which he prefers to the one purchased, and which he buys by delivering back the first one and paying an additional sum, but allows the article last purchased to remain an unreasonable time in the possession of the tradesman, it is liable to seizure on an execution against the latter: Carruthers v. Reynolds, 12 C. P. 596.

One who fraudently removes goods of an execution debtor to prevent their seizure is liable to an action therefor: Young v. Buchanan, 6 C. P. 218; Turner v. Patterson, 13 C. P. 412.

A person purchasing a crop of wheat at a bailiff's sale might bring trespass against a person injuring or converting it: Haydon v. Crawford, 3 O. S. 583.

A sale may be made after the expiry of an execution if seizure took place while it was in force; but if no seizure made during that time, then the sale is void; Doe d. Greenshields v. Garrow, 5 U. C. R. 237; Reynolds v. Streeter, 3 P. R. 315; Lee v. Howes, 30 U. C. R. 292; Hall v. Goslee, 15 C. P. 101.

A seizure by a bailiff before his removal from office on an execution then in force, would, it is submitted sustain a sale by him after he had ceased to be a bailiff: Doe d. Miller v. Tiffany, 5 U. C. R. 79.

Notwithstanding the wide terms of R. S. O. c. 64, s. 9, it would seem that shares, etc., in companies cannot be seized under a Division Court execution.

There is no warranty of title at a bailiff's sale, unless the bailiff expressly make one: Chapman v. Speller, 14 Q. B. 621; but there is a warranty that he does not know he is destitute of title to the goods: Peto v. Blades, 5 Taunt. 65.

The purchaser gets no better title than the execution debtor had; and if he had none, neither does the purchaser acquire any.

Growing fruit, being part of the realty, cannot be seized : Rodwell v. Phillips, 9 M. & W. 505.

A writ of execution issued too soon would not be a nullity but an irregularity only: Macdonald v. Crombie, 2 O. R. 243.

Where writ of execution is not renewed, but not through any default of any officer of the court, it will not be renewed nunc pro tunc: Lowson v. Canada Farmers' Mut. Ins. Co., 9 P. R. 309.

An expired execution cannot be renewed: Macdonald v. Crombie, 11 S. C. R. 109; Barker v. Palmer, 8 Q. B. D. 9; Doyle v. Kaufman, 3 Q. B. D., 7; Neilson v. Jarvis, 13 C. P. 182, 183; Price v. Thomas, 11 C. B. 543; Cole v. Sherard; 11 Ex. 482; Smalpage v. Tonge, 17 Q. B. D. 644; Lowson v. Farmers' Mut. Ins. Co., 9 P. R. 309.

A half-interest in a celebrated mare was held the subject of seizure: Gunn v. Burgess, 5 O. R. 685.

Where an order had been made which gave an execution priority over one in the sheriff's hands, it was held that the execution creditor, though a stranger to the action in which the order was made, had a locus standi to move to set aside the order: Glass v. Cameron, 9 O. R. 712.

The terms "fieri facias" and "warrant of execution" used in the Division Courts Act are convertible terms: Macfie v. Hunter, 9 P. R. 149.

Where a discharge in insolvency is a complete answer to the issue of an execution, see Forrester v. Thrasher, 2 O. R. 38; S. C. 9 P. R. 383.

A writ of execution is not a judicial act, and the court may inquire at what period of the day it was issued: Clarke v. Bradlaugh, 8 Q. B. D 63.

A bailiff who has taken possession of goods under a writ of execution has sufficient special property in them to enable him to maintain trespass and trover: Krehl v. Great Central Gas Co., L. R. 5 Ex. 289-298, or to insure them against fire: Drake on Attachment, 5th Ed. 291.

Should a mare in foal be seized under execution the right to the foal would follow the dam: Rogers v. Highland, Iowa Sup. Ct., 34 Alb. L.J. 397.

It is submitted that goods sold by a bailiff under execution may be lent by the purchaser to the debtor, and that such act is not a contravention of the Bills of Sale Act, provided it is not done for the purpose of protecting the goods against the creditors of such debtor: Graham v. Furber, 14 C. B. 410; Woodgate v. Godfrey, 5 Ex. D. 24; see Ex parte Cooper. In re Baum, 10 Ch. D. 313; Ex parte Odell. In re Walden, 10 Ch. D. 76; Williams v. McDonald, 7 U. C. R. 381.

When a person assists a bailiff on ext ution, his acts may be considered as those of the bailiff: McDougall v. Waddell, 28 C. P. 191.

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may be con-P. 191. A bailiff cannot make a valid contract for the sale of the goods of a judgment debtor, against whom he holds a writ of execution, until he has actually seized the goods: Ex parte Hall. In re Townsend, 14 Ch. D. 132; Samis v. Ireland, 4 A. R. 141.

Unless by section 7 of this Act (whereby all judgments in Division Courts are declared to have the same force and affect as judgments of Court of Record) it would seem that interest would not be recoverable on any judgment which the party might pay independently of execution. A right to interest on such judgments appears to depend upon the language here used within parenthesis: see R. v. The County Court Judge of Essex, 18 Q. B. D. 704.

It will be observed that the Statute (R. S. O. c. 143, ss. 27 et seq.) respecting distress for rent and taxes, provides that whatever goods are exempt from execution they are to be exempt from distress, and makes further provision in regard to goods which are exempt.

A return of nulla bona where there were goods is no more than an irregularity to be complained of by the defendant, and a third party cannot object that such a return was made at the instance of the solicitor of the plaintiffs: Molson's Bank v. McMeekin, 15 A. R. 535.

Held also, reversing the judgment of the county court of Wentworth, that a return of nulla bona could be properly made after the expiration of the writ: 1b.

Where the goods of a third party were seized and sold under an execution against the judgment debtor, and damages were recovered by such third party against the sheriff and paid by the plaintiff in accordance with an undertaking to indemnify the sheriff, an alias fi. fa. issued by the plaintiff in spite of the sheriff's return to the previous writ, "money made and paid to plaintiff's attorney" was set aside and satisfaction entered upon the judgment roll; and a summons to amend the sheriff's return discharged: Hanna v. McKenzie, 9 C. L. T. 358.

An execution is "completely executed by payment" within the meaning of R. S. O. c. 124, s. 9, when the bailiff gets the money: see Clarkson v. Severs, 17 O. R. 592.

Abandonment and priority of execution.—On chattels being seized by the sheriff, and afterwards, by direction of the plaintiff's attorney, abandoned, it was held that the execution debtor could then sell and give a good title to the goods: Gould v. White, 4 O. S. 124. A chattel seized by the sheriff, and lent by him before return of the writ, was held no abandonment: Hamilton v. Bouek, 5 O. S. 664. A sheriff, having seized goods under an execution, took a bond for the delivery thereof when he required them, and allowed the debtor to remain in possession and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor was received by the sheriff; it was held that the second writ took precedence of the first: Castle v. Ruttan, 4 C. P. 252. As remarked by Macaulay, C.J., at p. 260, in delivering the judgment of the court, "The sheriff, in the absence of directions, acts upon his own responsibility; and if he adopts a course which conflicts with the rights of others, he may incur responsibility to the first execution creditor, or to the second; but he has no discretion to bond the goods to the debtor or suffer him to continue the possession or use of the goods and to prosecute his business with them as before, suspending and deferring the execution indefinitely, and until long after its return, without further acting upon it, and at the same time to interpose the expired writ between the writ of another creditor and the goods " two ineffectual attempts by the sheriff to sell certain articles, which he

Section 212

considered chattels, he left them where they were; the execution debtor removed and sold them. It was held that the seizure had not been abandoned, and that the sheriff might retake them: Walton v. Jarvis, 14 U. C. R. 640. Where the plaintiff s attorney had ordered execution to be stayed, and afterwards telegraphed the sheriff that he must act as he thought fit, it was held that this answer was an abandonment of the stay: Boulton v. Smith, 17 U. C. R. 400. The bailiff, having merely made an inventory of the goods seized under a ft. fa., leaving no one in possession, it was held that they were not in custodia legis, and therefore could not be held against the landlord's claim for rent: Hart v, Reynolds, 13 C. P. 501. A sheriff having seized goods under an execution, left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested so to do, the landlord of the execution debtor having in the meantime seized and sold the goods for rent due him by the debtor, it was held, in an action by the sheriff, that he had not at the time of the distress such a possession of the goods as prevented the landlord from distraining for rent: McIntyre v. Stata, 4 C. P. 248; see also Robertson v. Fortune, 9 C. P. 427. Long delay of a writ in a sheriff's hands does not of itself amount to an abandonment of it, but it is evidence of it: Mein v. Hall, 13 C. P. 518. Taking an execution by the plaintiff to the clerk for renewal, would not be an abandonment of it: Rowe v. Jarvis, 13 C. P. 495; Meneilly v. McKenzie, 3 E. & A. 209. In an action against a sheriff for a false return, it appeared that on the day before the plaintiff's writ came in, he received a fi. fa. at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiff's writ he did nothing. The plaintiff's attorney wrote twice, urging him to act and ruled him, and afterwards he returned the writ nulla bona, K.'s writ having been previously renewed, the court being left to draw inferences of fact, it was held, as a matter of fact that the sheriff never seized; or, as a matter of law, if he did, he had abandoned the seizure: Foster v. Glass, 26 U. C. R. 277. A bailiff who has withdrawn from possession of goods after seizure may again seize them if the writ is in force: Gates v. Smith, 13 C. P. 572. As to the difference between the rights of a subsequent execution creditor, as in Castle v. Ruttan, and one who purchases from an execution debtor, even after abandonment of the seizure, but while the execution is in force, see the remarks of Gwynne, J., at pages 470 and 471 of 19 C. P. in McGivern v. McCausland; see also 5 U. C. L. J. 250. In that connection it must be borne in mind that a Division Court execution does not bind the goods before seizure: Culloden v. McDowell, 17 U. C. R. 359, whereas a writ in the sheriff's hands does. Where a writ was delivered to a sheriff, with instructions not to levy until another execution came in, it was held that a subsequent execution took priority: Ross v. Hamilton, E. T. 3 Vic. Such a writ is not in the sheriff's hands to be executed: Foster, v. Smith, 13 U. C. R. 243; In re Ross, 3 P. R. 394. If the bailiff is notified not to proceed and execute a writ, from that moment it loses its priority: Bank of Montreal v. Munro, 23 U. C. R. 414; Patterson v. McKellar, 4 O. R. 407; see also Kerr v. Kinsey, 15 C. P. 531; Trust and Loan Company v. Cuthbert, 13 Gr., 412. A sheriff cannot seize goods on execution already under the seizure of a Division Court bailiff: King v. Macdonald, 15 C. P. 397; but he may obtain them from the bailiff under the Creditors' Relief Act, see in fra. The foregoing cases are principally on fi./a.'s in the hands of sheriffs, but it is submitted that the principles of them have a direct application to Division Court executions in the hands of a bailiff, always keeping in mind that a bailiff's right to the goods is by virtue of a continuing seizure. If a bailiff should enforce an execution where

he had no authority he would be liable: Davis v. Moore, 4 U. C. R. 209. In Lossing v. Jennings, 9 U. C. R. 406, a bailiff of a Division Court, having an execution against J. L., went to him and seized a yoke of oxen, which he allowed him to retain on receiving by endorsement on the writ and acknowledgment of the levy, it was held that the debtor had put it out of his power to sell the oxen. See, also, Duffus v. Creighton, 14 S. C. R. 740. Where a sheriff seized goods in the morning, and went away, intending to return in the evening, and visited the property daily, he was held to continue in possession: Beatty v. Rumble, 21 O. R. 184. On an execution against A., money belonging to him in the hands of B., may be seized, but it must be shewn to be the identical money of A.: Clarke v. Easton, 14 U. C. R. 251. Action against third party for illegal seizure and evidence connecting him with it: see Slaght v. West, 25 U. C. R. 391; McClevertie v. Massie, 21 C. P. 516; Tilt v. Jarvis, 7 C. P. 145; McLeod v. Fortune, 19 U. C. R. 98; Kennedy v. Patterson, 22 U. C. R. 556; Cronshaw v. Chapman, 7 H. & N. 911; Woollen v. Wright, 1 H. & C. 554; Stevens v. Pennock, 30 U. C. R. 51; Smith v. Keal, 9 Q. B. D. 340; Williamson v. Harvey, 15 O. R. 346.

Exemptions.—The following are the exemption clauses of chapter 64 of the R. S. O., and have reference to executions from Division Courts as well as other courts:

EXEMPTION.

[R. S. O., Cap. 64.]

"2. The following chattels are hereby declared exempt from seizure under any writ, in respect of which this Province has legislative authority, issued out of any court whatever in this Province, namely:

"1. The bed, bedding and bedsteads (including a cradle), in ordinary use by the debtor and his family;

"2. The necessary and ordinary wearing apparel of the debtor and his family;

"One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea cups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing bruth, one blacking brush, one wash board, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this sub-division enumerated, not exceeding in value the sum of \$150;

"4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of \$40;

"5. One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of \$75, and food therefor for thirty days, and one dog;

"6. Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of \$100;

"7. Bees reared and kept in hives to the extent of fifteen hives. 50 V. c. 10, s. 1.

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- "3. The debtor may in lieu of tools and implements of, or chattels ordinarily used in his occupation referred to in sub-division 6 of section 2 of this Act, elect to receive the proceeds of the sale thereof up to \$100, in which case the officer executing the writ shall pay the net proceed such sale if the same shall not exceed \$100, or, if the same shall exceed \$100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said sub-division 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor. 50 V. c. 10, s. 2.
- "4. The chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or, if there is no widow, the family of the debtor shall be entitled to the exempted goods, and the goods so exempted shall not be liable to seizure under attachment against the debtor as an absconding debtor. R. S. O. 1877, c. 66, s. 3.
- "5. The debtor, his widow or family, or, in case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure. R. S. O. 1877, c. 66, s. 4.
- "6. Nothing herein contained shall exempt any article enumerated in sub-divisions 3, 4, 5, 6 and 7 of section 2 of this Act from seizure in satisfaction of a debt contracted for the identical article. R. S. O. 1877, c. 66, s. 5.
- "7. Notwithstanding anything contained in the next preceding five sections, the various goods and chattels which are now liable to seizure in execution for debt shall, as respects debts which have already been or shall be contracted prior to the first day of October, 1887, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized has endorsed upon it a certificate signed by the Judge of the court out of which the writ issues, if a Court of Record, or where the execution issues out of a Division Court, by the clerk of the court, certifying that it is for the recovery of a debt contracted before the date hereinbefore mentioned. 50 V. c. 10, s. 3; 51 V. c. 11, s. 6."

A boat in lawful use by the owner, though not a fisherman, is exempt: Daragh v. Dunn, 7 U. C. L. J. 273.

If goods exempt are seized and sold the execution creditor is not entitled to the money, but the execution debtor would be: Michie v. Reynolds, 24 U. C. R. 303.

A horse ordinarily used in the debtor's occupation not exceeding in value \$60 was held exempt from seizure under the original Exemption Act: Davidson v. Reynolds, 16 C. P. 140. But if worth more than \$60, it was not: McMartin v. Hurlburt, 2 A. R. 146. If worth not more than \$100, it would now be exempt.

Money received by a debtor from an insurance company by reason of a fire destroying exempted goods is exempt from garnishment: Osler v. Muter, 19 A. R. 94.

Wearing apparel consists of that which is worn or made to be worn. Cloth actually appropriated thereto was held to be apparel: Richardson v. Buswell, 10 Metc. 507; see also Astor v. Merrett, 111, U. S. 202.

Tools and implements.—"Tools" are mechanical instruments of any kind for working with. The term includes all instruments of manual operation, but particularly such as are used by farmers and mechanics: Oliver v. White. 18 S. C. 241.

"Implements" is used for things of necessary use in any trade or mystery which are employed in the practice of the said trade, or without which the work cannot be accomplished: Terms de la Ley, cited Stroud, 462.

"Implements of trade" are those implements used in a man's trade or business. It has been held that the expression "implements of a debtor's trade" refers to the business of a mechanic, as a carpenter, blacksmith, silversmith, printer or the like: Attwood v. DeForest, 19 Conn. 517. But the words used in our Act have a wider significance: "Tools and implements of, or chattels ordinarily used in the debtors occupation" would cover any business and profession as well as a mechanical occupation.

A music teacher's piano has been held in the U.S. to be an instrument of business: Amend v. Murphy, 69 Ill. 338.

A steam engine used for working a threshing machine was held to be an instrument of husbandry: R. v. Malty, 8 E & B. 712.

Setting aside an execution.—An execution would not be set aside because issued by the clerk at his own house before office hours: Rolker v. Fuller, 10 U. C. R. 477.

An irregular execution will not be set aside at the instance of a subsequent creditor, a stranger to the execution: Perrin v. Bowes, 5 U. C. L. J. 138; cases cited in notes to this section, *upra; but if judgment and execution are fraudulent, they can both be set aside at the instance of a subsequent execution creditor: Balfour v. Ellison, 8 U. C. L. J. 330; Commercial Bank v. Wilson, 3 E. &. A. 257; see also, Glass v. Cameron, 9 O. R. 712.

Costs.—A plantiff who has recovered a judgment for debt and costs, and has received the debt out of court, is entitled to have execution for costs, and a mandamus would be granted to the clerk to compel its issue: R. v. Fletcher, 2 E. & B. 279; In re Linden v. Buchanan, 29 U. C. R. 1.

As to costs where Judge has no jurisdiction, see section 207, s-s. (2), and notes thereto.

Creditor's Relief Act.—R. S. O. c. 65, contains some important provisions affecting the rights of the plaintiff under executions. By that Act the priority among creditors by execution from the High Court and County Courts is abolished. If, then, an execution has issued from one of these courts, and a bailiff has levied upon the debtor's goods by selling the same, all creditors who within one month from the time of entry of notice of the levy by the sheriff in a book kept in his office for that purpose, are entitled to share rateably in the proceeds, subject to the payment of the costs of the creditor under whose writ the amount was made. During the month other creditors may either lodge their executions with the sheriff, or may file with him certificates of a County Court clerk of their claims, which certificates have the same effect, as to levies made by the sheriff, as executions.

Provisions are made by the Act for contesting claims both by the debtor and by other creditors. Other creditors cannot, however, raise any defence not going to the bona fides of the claim: Bowerman v. Philips, 15 A. R. 679. The following are the more important provisions affecting Division Courts:

14. A creditor who has recovered a judgment in a Division Court against the debtor may serve upon the sheriff a memorandum of the amount of his judgment and of the costs to which he is entitled, under the hand of the clerk and the seal of the Division Court; and the memorandum so served shall have the same effect for the purposes of this Act as if the creditor had delivered to the sheriff a writ of execution directed to the said sheriff from a County Court. 43 V. c. 10, s. 7 (23).

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A debtor notwithstanding the Creditor's Relief Act may specifically pay off an execution, and the money will not be distributable among all oreditors. So, also, may a mortgage whose mortgage intervenes between the first and second executions: Davies Brewing & Malting Co. v. Smith, 10 P. R. 627.

Where an interpleader issue is directed, only those creditors who are parties thereto share in the benefits: R. S. O. c. 65, s. 4, s.s. 3; 51 Vic. c. 11, s. 5; Reid v. Gowans, 13 A. R. 501: Bank of Hamilton v. Durrell, 15 A. R. 500; but not if the claimant abandons: Wait v. Sager, 14 P. R. 347.

The Act does not alter the legal effect of executions, nor give to firm or separate creditors of a partnership any different rights from those they had before: McDonagh v. Jephson, 16 A. R. 107.

After the sheriff had been served with this memorandum, the Division Court creditor would, perhaps, be entitled to share in moneys realized from lands, if the goods were insufficient: Harvey v. McNeil, 12 P. R. 362.

- 25. (1) If the sheriff does not find sufficient property of a debtor levia ble under executions and claims in his hands to pay the same in full, and the heriff finds goods and chattels in the hands of the bailiff of a Division Court under a writ of execution or attachment against the debtor, the sheriff shall demand and obtain the goods and chattels from the bailiff, who shall forthwith deliver the same to the sheriff, with a copy of every writ of execution in his hands against the debtor, and a memorandum shewing the amount to be levied thereunder, including the bailiff's fees so far as proceedings have been taken by him, and shewing the date upon which each writ was received by him.
- (2) In case the bailiff fails to deliver any of the goods, he shall pay double the value of the property retained, such double value to be recovered by the sheriff from the bailiff with costs of suit, and to be by the sheriff accounted for as part of the estate of the debtor.
- (3) The sheriff shall distribute the proceeds among the creditors under the provisions of this Act, and the Division Court execution creditors shall be entitled, without further proof, to stand in the same position as execution creditors whose writs are in the sheriff's hands. 43 V. c. 10, s. 9.

No lien upon the goods is given to the bailiff for his fees. Contrast section 56a, ante p. 46, and see notes thereto. But the fees are a first charge upon the goods, and are to be paid by the sheriff: 52 V. c. 12, s 7.

By the Act to amend the law as to executions, 51 V. c. 11, s. 4, it is exected:

Enforcing Division Court claims. 212a. Where any Division Court judgment or execution has been or shall hereafter be filed with anysheriff under The Creditors' Relief Act, or a certificate for any claim within the jurisdiction of the Division Court, and the same is not paid in full, and the sheriff is unable to make the money thereon, the creditor may obtain a return thereof from the sheriff according to the facts, and file the same with the clerk of the Division Court in which the judgment was recovered, or in the place where the cause of action arose, or the debtor, or one of the debtors, if more than one,

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resided, and the clerk of the Division Court shall enter the 3ections 212-213 same in his proper books, and it shall thereupon become a judgment of the said Court for the unpaid balance due thereon as appearing by the sheriff's return, and the claim may be enforced in the same manner as any other judgment of the Division Court.

May be enforced. - An execution against goods, a transcript to another Division Court, a judgment summons, a garnishee summons or a transcript to a County Court, might be issued thereon. The other means of enforcing same, given by section 73, might also be resorted to.

And by 52 V. c. 12, s. 7.

212b. When the sheriff, under the provisions of The Bailiffs' fees when Creditor's Relief Act, takes possession of goods which are goods in its possession of goods which are goods in the provision of the Bailiffs' fees when the goods in the provision of the Bailiffs' fees when the goods which are goods in the goods in the goods which are goods in the goods which are goods in the g in the possession of a Division Court bailiff under a writ ston are taken by of attachment or execution, the costs and disbursements of sheriff. the said bailiff shall be a first charge upon the goods, and shall be paid by the sheriff to the said bailiff upon demand, after being taxed by the Division Court clerk.

The bailiff cannot hold the goods until his fees are paid. It would seem that the sheriff cannot compel the bailiff to wait until he has realized upon the goods. If the goods are claimed by a third party the right of the bailiff to fees would depend upon whether the goods belonged to the debtor or the third party: Newman v. Merriman, 26 L. T. N. S. 397; see Thomas v. Peek, 20 Q. B. D. 727; and it would only be right that the clerk should not tax them until the claim had been adjudicated upon.

213. If there are cross judgments between the parties, Cross judgments may the party only who has obtained judgment for the larger be set off. sum shall have execution, and then only for the balance over the smaller judgment, and satisfaction for the remainder and also satisfaction on the judgment for the smaller sum shall be entered; and if both sums are equal, satisfaction shall be entered upon both judgments. R. S. O. 1877, c. 47, s. 157.

Satisfaction shall be entered upon both judgments.—This is simply applying the principle of setting of judgments: Throckmorton v. Crowley, L. R. 3 Eq. 196; Mercer v. Graves, L. R. 7 Q. B. 499; Exparte Griffin. In re Adams, 14 Ch. D. 37; Grant v. McAlpine, 46 U. C. R. 284; Brown v. Nelson, 11 P. R. 121; C. P. Ry. Co. v. Grant, 11 P. R. 208; Flett v. Way, 14 P. R. 312; Moody v. Canadian Bank of Commerce, 14 P. R. 258.

The section does not say upon whose application the set-off of cross judgments may be made. We suggest that it may be made on the application of either party as he may be advised.

A set-off will not be allowed to the prejudice of a solicitor's lien for costs: C. P. Rv. Co. v. Grant, 11 P. R. 208; Flett v. Way, 14 P. R. 312; see notes to section 197.

Sections 214-216

214. Except in cases brought under section 82 of this Act, no writ in the nature of a writ of execution or attach-Writs of where to be ment shall be executed out of the limits of the county over which the Judge of the Court from which the writ issues has jurisdiction. R. S. O. 1877, c. 47, s. 158.

> Not to be executed out of limits of county.—Every writ of execution or attachment must be executed within the county from which it issues, except in cases where the sitting of the court is nearest to defendants residence, as provided in section 82.

> If the execution of such writ should be attempted out of the county, the bailiff would be a trespasser: Davis v. Moore, 4 U. C. R. 209; Campbell v. Coulthard, 25 U. C. R. 621; Davy v. Johnson, 31 U. C. R. 153; Hoover v. Craig, 12 A. R. 72.

If party removes to another county, execution obtainable in such county.

215. In case a party against whom a judgment has been entered up removes to another county without satisfying the judgment, the County Judge of the county to which the party has removed may, upon the production of a copy of the judgment duly certified by the Judge of the county in which the judgment has been entered, order an execution for the debt and costs, awarded by the judgment, to issue against such party. R. S. O. 1877, c. 47, s. 159.

The provisions of this section are very seldom resorted to. Proceedings by transcript under section 217 are usually adopted.

Effect of payment of execution before sale.

216. If the party against whom an execution has been awarded, pays or tenders to the clerk or bailiff of the Division Court out of which the execution issued, before an actual sale of his goods and chattels, such sum of money as aforesaid, or such part thereof as the party in whose favour the execution has been awarded agrees to accept in full of his debt, together with the fees to be levied, the execution shall thereupon be superseded, and the goods be released and restored to such party. R. S. O. 1877, c. 47, s. 160.

Pays or tenders.—See notes to section 122.

To the Clerk or Bailiff. - The bailiff would only have authority to receive it if he had an existing execution in his hands: 5 U. C. L. J. 82; Preston v. Wilmot, 23 U. C. R. 348; Kero v. Powell, 25 C. P. 448.

The fees to be levied.—Should the proper fees be tendered and refused, further proceedings by the bailiff would render him liable as a trespasser : Bennett v. Bayes, 5 H. & N. 391.

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And remaining in possession would be a trespass each day: Playfair Sections v. Musgrave, 14 M. & W. 239; Ash v. Dawnay, 8 Ex. 237.

As to what are proper fees, see the tariff; Forms 132, 133, 134.

It may be said that a return of nulla bona does not entitle a bailiff to mileage: 5 U. C. L. J. 82. There can be no mileage where seizure is not made: 5 U. C. L. J. 181.

Where the execution is satisfied in whole or in part after seizure and before sale, the bailiff is entitled to 3 per cent. on the goods therefor: see tariff, item 13 of bailiff's fees, and he has a lien therefor: 52 V. c. 12, s. 2: see section 56 (a), ante p. 46; Smith v. Antipitzky, 10 C. L. T. 368.

Goods be released and restored.—The object of this section is to allow a party to settle the amount of debt and costs before an actual sale of his goods and chattels. He may do so by paying or tendering to the clerk or bailiff of the court out of which the execution issued, such sum of money as the judgment or execution, if issued, may call for, or such sum as the judgment creditor agrees to accept in full of his debt, together with the fees to be levied. When this has been done, he has a right to have his goods released from execution and restored to him.

A defendant having recovered a judgment against the plaintiff in the Division Court at Toronto, a transcript was ordered to be sent to another Division Court at Unionville, but by some mistake in the Division Court office it was not sent until after the debt had been paid, and the clerk of the Toronto Court endorsed on it a direction to the clerk of the other court to issue execution and remit the money to him when made. The plaintiff's goods having been seized under this execution, he sued the defendant for having wrongfully and maliciously and without reasonable or probable cause, caused the same to be issued and the plaintiff's goods to be seized thereunder. The defendant had never interfered or given any directions beyond instructing the suit to be brought. Held, that the plaintiff could not recover; that it was his duty to protect himself by seeing that the clerk of the Division Court was notified of payment of the debt, and there was, therefore, no malfeasance or omission on the defendant's part. Held, also, that the defendant was not liable in trespass, for he had not authorized the direction by the clerk to issue execution, which is no part of the clerk's duty, and that neither could he have been responsible if the attorney had directed it after the suit had been settled: Tuckett v. Eaton, 6 O. R. 486.

In that case it was said to be a doubtful question whether, under this section, a person whose goods had been seized under Division Court process could have any further relief than the return of his goods.

217. The clerk of a Division Court shall, upon the Clerk of any court application of a plaintiff or defendant (or his agent), having in which judgment an unsatisfied judgment in his favor in such court, prepare entered to a transcript of the entry of the judgment, and shall send transcript thereof, the same to the clerk of any other Division Court, whether to transmit to any in the same or any other county, with a certificate at the other Division foot thereof signed by the clerk who gives the same, and court. sealed with the seal of the court of which he is clerk, and addressed to the clerk of the court to whom it is intended to be delivered, and stating the amount unpaid upon the D.C.A.-20

judgment and the date at which the same was recovered; and the clerk to whom the certificate is addressed shall, on the receipt of the transcript and certificate, enter the transcript in a book to be kept in his office for the purpose, and the amount due on the judgment according to the certificate; and all proceedings may be taken for the enforcing and collecting the judgment in such last mentioned Division Court, by the officers thereof, that could be had or taken for the like purpose upon judgments recovered in any Division Court. [After a transcript has been issued under this section, no further proceedings shall be had in the Court from which the transcript issued without an order from the Judge, unless the creditor, his solicitor or agent, shall make and file with the clerk of the said Court an affidavit stating: (1) That the judgment remains unsatisfied in whole or in part; (2) that the execution issued in the division to which the transcript was issued has been returned nulla bona, or that he believes the defendant has not sufficient goods in that division to satisfy the said judgment, and upon such affidavit being filed, the clerk may issue such other process as the creditor may direct.] R. S. O. 1877, c. 47, s. 161; 52 V. c. 12, s. 24.

Proceedings stayed in office from which transcript of judgment is issued.

Upon the application of a Plaintiff or Defendant.—Under this section the clerk cannot, upon his own mere motion, prepare and send the transcript which this section requires. It can only be done upon the application of the plaintiff or the defendant, or the agent of either party, as the case may be. The transcript may shew whether the whole or any part of a judgment remains unsatisfied, and the clerk shall be bound to send the same to the clerk of any other Division Court whether in the same or any other county, with a certificate at the end thereof signed by him and sealed with the seal of the court of which he is clerk, and addressed to the clerk of the court to whom it is intended to be delivered.

All proceedings may be taken.—Where a plaint was brought in the wrong division and the defendant filed a notice disputing the claim and the jurisdiction of the court, but did not appear at the trial, and judgment was given against him: and subsequently transcript of the judgment was transmitted to the court of the division in which defendant resided, it was held, that the judgment did not thereby become a judgment of the latter court, and prohibition was granted to the court in which the judgment was originally obtained notwithstanding such transmission: In re Elliott v. Norris, 17 O. R. 78; see Labatt v. Chisholm, 2 West. L. T. 54. Nevertheless, the bailiff of the foreign court cannot be called to account by the Judge of the home court: R. v. Shropshire (Judge), 20 Q. B. D. 242.

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As the creditor may direct.—The clause in brackets was introduced in the Act of 1889. The effect of it is that all proceedings in the original court are stayed after the issue of a transcript therefrom to another Division Court, unless: (1) The Judge otherwise orders; or (2) unless the creditor, his solicitor or agent shall make and file with the clerk of such original court, an affidavit stating the facts set out in the language of the context. In which case the clerk may issue such other process as the creditor may direct.

This affidavit may be entitled in the court in which judgment originally obtained. It may be made by the judgment creditor, his solicitor or agent; and it should follow the precise wording of the statute.

For form of affidavit see forms post,

See also note to section 216, and Rules 161-163.

218. The clerk of every Division Court shall, immedicities notice ately after nulla bona has been returned to an execution of return of issued on a transcript of judgment received from another in case of court, forward through the post office to the plaintiff, if his execution on a transcript of address is known, or to the clerk who issued the transcript, judgment. at his post office address, a notice, enclosed in an envelope, informing him of the date at which the execution issued, the date at which the same was returned by the bailiff, and the return made thereto; the notice thus sent shall be prepaid and registered, and the clerk shall obtain and file among the papers in the action the post office certificate of the registration, and the postage and charge for registration shall be costs in the cause: the absence from amongst the papers in the action of the certificate of registration shall be prima facie evidence against the clerk that the notice has not been forwarded. 45 V. c. 7, s. 6.

Notice of return of nulla bona.—The clerk to whom a transcript is sent is here required to send immediately through the post, prepaid and registered, to the plaintiff, if his address is known, or to the clerk who issued the transcript, a notice informing him: (1) When the execution issued: (2) the date of its return; (3) the return of the bailiff thereto. As to meaning of "immediately" see note to section 112. The language of this section requires the clerk to send the notice to the plaintiff if his address is known, and it is only when his address is not known to. him that the clerk should send it to the clerk who issued the transcript. The object is to bring home the nature of the return to the person most. interested—the plaintiff. As the absence of the post office certificate of the registration of the letter containing the notice may militate against, the clerk, the importance to him of always registering such letters will be apparent. The absence of such certificate is only prima facie evidence of the notice not having been sent. The statute would be virtually complied with if there was any other evidence of the notice having been received by the plaintiff or the clerk who issued the transcript: Campbell

v. Barrie, 31 U. C. R. 279. But the safest course is for the clerk to register the letter and carefully preserve the certificate of registration in

This section was held in Jones v. Paxton, 19 A. R. 163, to have changed the law laid down in Burgess v. Tully, 24 C. P. 549, and to have rendered it unnecessary to the validity of a transcript to the county court that execution should issue out of the home court.

Revival of judgment in case of death of party to judgment.

210. In case of the death of either or both of the parties to a judgment in a Division Court, the party in whose favour the judgment has been entered, or his personal representative in case of his death, may revive the judgment against the other party, or his personal representative in case of his death, and may issue execution thereon in conformity with any rules which apply to the Division Court in that behalf. R. S. O. 1877, c. 47, s. 162.

May revive such judgment.—See Rules 155-157, and forms therein referred to.

The party who seeks to revive the judgment, or against whom it is sought to revive the same, must be duly appointed the personal representative before a proceeding can be taken.

In Keena v. O'Hara, 16 C. P. 435, it was held that an action might be revived against an executor de son tort.

Execution when dated able.

220. Every execution shall be dated on the day of its and return-issue, and shall be returnable within thirty days from the date thereof, but may, from time to time, be renewed by the clerk, at the instance of the execution creditor, for six months from the date of such renewal, in the same manner and with the same effect as like writs from the Courts of Record may be renewed under the provisions of The Execution Act. R. S. O. 1877, c. 47, s. 163; 43 V. c. 8, s. 64.

Rev. Stat.

Within thirty days .- A writ issued on 24th April was held in force on 24th May: Clarke v. Garrett, 28 C. P. 75. The effect of which decision is that the day of issue is excluded; see also notes to section 109, ante p. 148, and to section 86, ante. p. 118.

For six months.—This means six calendar months: Inter. Act, s. 8, s-s. 15.

The execution may be renewed "from time to time," which means that it may be renewed more than once: see Neilson v. Jarvis, 13 C. P. 176, and other cases cited in note to section 32, p. 24, ante.

An execution need not be renewed when it has been acted upon or ievy made: Neilson v. Jarvis, 18 C. P. 176; see also Miller v. Beaver M. F. Ins. Ass., 14 C. P. 399.

An execution that has expired cannot be renewed: notes to section 212, ante p. 296; and nothing can be legally done under it: Weston v. Thomas, 6 U. C. L. J. 181; Gardiner v. Juson, 2 E. & A. 188; and a sale

by the defendant of his goods would cut out the execution creditor, or any Sections one claiming under a supposed sale on such writ: Carroll v. Lunn, 7 C. P. 510; Buffalo & L. H. Ry. Co. v. Brooksbanks, 16 U. C. R. 337; see section 212, and rotes thereto.

The too common practice of clerks renewing executions at the instance of bailiffs, or of their own mere motion, is entirely unwarranted and of no legal effect. The same view will be found expressed at pp. 175, 176 of 5 L. C. G. It is doubtful if an execution creditor could ratify such an act: Brook v. Hook, L. R. 6 Ex. p. 95; Westloh v. Brown, 43 U. C. R. 402; Turner v. Wilson, 23 C. P. 87. Certainly not, except done within the time for which the renewal was made: Ainsworth v. Creeke, L. R. 4 C. P. 470; nor perhaps at all: Taylor v. Ainslie, 19 C. P. 78; Prince v. Lewis, 21 C. P. 63; Patterson v. Fuller, 32 U. C. R. 240. The authority to the clerk to issue execution would not imply a right to renew it. The unauthorized renewal by the clerk of an execution, even if such could be ratified, would not affect the rights of other creditors before ratification: Ainsworth v. Creeke, supra; Bird v. Brown, 4 Ex. 796; Hutchings v. Nunes, 1 Moo. P. C. N. S. 243; but see Vanderlip v. Smyth, 32 C. P. 60; Bolton Partners v. Lambert, 41 Ch. D. 295.

See Rules 158 and 176.

221. Where the books, papers and other matters in the Renewal of executions possession of any clerk, by virtue of or appertaining to his by county office, become the property of the County Crown Attorney, cases, under section 50 of this Act, or in case of the suspension of a clerk, the County Crown Attorney may, during such suspension, or until the appointment and qualification of another clerk, when the same shall be presented for that purpose, renew any writ of execution issued out of such court, which may lawfully be renewed, and the renewal shall have the same force and effect as if the same had been renewed by a clerk of the court, and he shall be entitled to the same fees therefor as a clerk for like services. 43 V. c. 8, s. 57.

Section 50 of this Act. - See p. 40 ante.

Suspension of a clerk.—See sections 29 and 31, ante p. 23.

Renew any writ of execution .- As to when writ may be renewed, see section 220, and notes thereto.

oath made to him by the party in whose favour a judg-order an execution ment has been given, or is satisfied by other testimony that to issue such party will be in danger of losing the amount of the day. judgment, if compelled to wait till the day appointed for the payment thereof before any execution can issue, the Judge may order an execution to issue at such time as he thinks fit. R. S. O. 1877, c. 4 3, 164.

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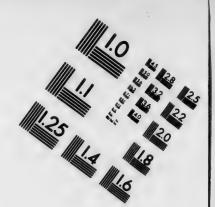
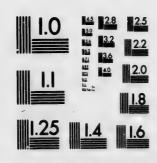


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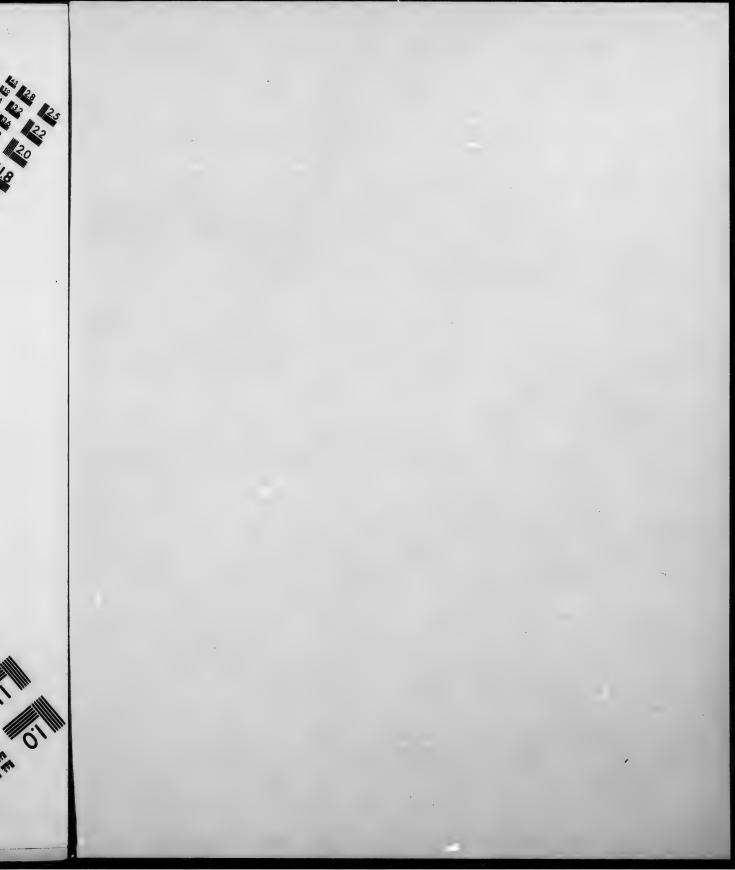


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Sections 222-223

At such time as he thinks fit.—The application must be made to the Judge, and it had better be so made upon affidavit in due form to be filed in the court. Such affidavit must be made by the party in whose favour such judgment has been given. It could not be made by any other. Should such affidavit not be obtainable, the Judge could satisfy himself by other testimony (by which is meant either affidavit or oral testimony) that the party would be in danger of losing the amount of the judgment if compelled to wait until the day appointed for payment thereof, before any execution could issue, and might order an execution to issue forthwith or at such time as he thinks fit.

From the context of this section, and the object it has in view, we are of opinion that the application could be made ex parte.

If execution returned transcript.

223. In case an execution is returned nulla bona, and the sum remaining unsatisfied on the judgment under parties may obtain which the execution issued amounts to the sum of \$40, the plaintiff or defendant may obtain a transcript of the judgment from the clerk, under his hand and sealed with the seal of the court, which transcript shall set forth.

- 1. The proceedings in the cause;
- 2. The date of issuing execution against goods and chattels; and
- 3. The bailiff's return of nulla bona thereon, as to the whole or a part. R. S. O. 1877, c. 47, s. 165.

Return nulla bona. This is a return made by a bailiff when there is no property to distrain upon: Wharton, 512.

If the execution should expire, nothing having been done within three mouths, a return of nulla bona may be made after that time: Molson's Bank v. McMeekin, 15 A. R. 53b.

Should a seizure be made before the execution expires, there need be no renewal of the execution: Neilson v. Jarvis, 13 C. P. p. 183, per Draper, C.J. But if on such seizure, part of the money were made and nulla bona returned as to residue, there could be a transcript for such residue, provided it amounted to \$40 or upwards.

If no execution were issued from the home Division Court, but a transcript had been issued to another Division Court and a return of nulla bona made to the execution issued thereon, there could, nevertheless, be a valid transcript to the county court: Jones v. Paxton, 19 A. R. 163. The decision in Burgess v. Tully, 24 C. P. 549, is, on this point, not now

If execution against more than one defendant the goods of all should be exhausted before a return of nulla bona: Ontario Bank v. Kerby, 16 C. P. 35; Molsons Bank v. McMeekin, 15 A. R. 535.

In the latter case the plaintiff recovered a judgment in the Division Court and issued an execution thereon, under which nothing was made and which expired by lapse of time. At the request of plaintiff's solicitor the bailiff returned the writ nulla bona, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of their Division Court judgment in regular form and filed the same in the office of the clerk of

the County Court and sued out a fi. fa. goods in order to obtain the Section benefit of the provisions of the Creditor's Relief Act. The respondent S., the holder of the execution in the Division Court, then moved to set aside the plaintiff's proceedings and they were accordingly set aside by the County Court Judge on the ground that the judgment in the County Court was void, being founded on a return to an expired execution.

Held, that a return of nulla bona where there were goods was not more than an irregularity to be complained of by the defendant. Nor could a third party object that such return was made at the instance of the solicitor of the plaintiffs.

Held, also, reversing the judgment of the County Court, that a return of nulla bona could be properly made after the expiration of the writ: and that the transcript and judgment in the County Court founded thereon were valid and regular.

A transcript of a Division Court judgment was obtained to the District Court of the Thunder Bay district: Held, that it was not necessary to issue a fi. fa. goods from such District Court before a valid sale could take place under a fi. fa. lands issued therefrom: Daby v. Gehl, 18 O. R.

It was also held that, under the circumstances in that case, the defendant could not set up that the proceedings under an expired writ constituted a payment of the execution debt: Ib.

The sum remaining unpaid—This means the whole or any balance remaining unpaid on the judgment, whether debt or debt and costs. The costs of recovering the judgment when taxed by the clerk and entered in procedure book are as much part of the judgment debt as the principal money or damages recovered. It is submitted that under section 7, by which judgments in Division Courts are made to have "the same force and effect as judgments of Courts of Record," that interest on the amount of the judgment can be estimated under this section. It is also submitted that costs of execution are part of "the sum remaining unsatisfied on the judgment." The costs of execution are chargeable against the defendant, and he could not satisfy the judgment without discharging such costs also. So also would costs of a judgment summons. By section 301 it is declared that the Rules and Forms, when approved of, "shall have the same force and effect as if they had been made and included in this Act." On referring to the form of transcript to the County Court (Form 99), it will be seen that reference is there made to Form 98, in which the "amount due" is made up of the debt and costs of the judgment, "additional costs," and additional interest. The additional costs there referred to can only mean such as costs of execution and other authorized proceedings. It would be anomalous that a plaintiff should be obliged to issue an execution before he could transfer his cause to the County Court: Burgess v. Tully, 24 C. P. 549, and then that the costs of doing so should not form part of the amount of his unsatisfied judgment. This view is very much strengthened by the fact that the entry to be made by the clerk of the County Court, under section 224, shall contain the names of the parties, "the amount of the judgment, also the amount remaining unsatisfied thereon," which amount can only be got by the clerk on reference to the total amount of judgment, interest and subsequent costs appearing on the transcript as unpaid; but see Marquis of Salisbury v. Ray, 8 C. B. N. S. 193; Re Long. Ex parte Cuddeford, 20 Q. B. D. 316.

A creditor for less than \$40, cannot attack a conveyance of land as fraudulent: Zilliax v. Deans, 20 O. R. 539.

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The proceedings in the cause.—It was held that there could be no valid judgment in the County Court or sale of lands founded on a transcript which omitted to state the issue and return of an execution in the Division Court: Farr v. Robins, 12 C. P. 35.

In Jacomb v. Henry, 13 C. P. 377, the sale of lands was held void because the transcript only contained a certificate shewing the court, the names of the parties, that judgment had been recovered, and when, the several amounts of debt and costs, that execution had issued, and was returned on a certain date; but no mention of the proceedings anterior to the judgment.

It was held also that if the transcript does not shew that the proceedings were commenced by attachment (if such was the case) the whole proceedings on such transcript in the County Court are void: Hope v. Graves, 14 C. P. 393; see also Burgess v. Tully, 24 C. P. 549, as to the importance of carefully observing the provisions of the section.

In the case of Bridge v. Branch, 1 C. P. D. 633, it was held, under a somewhat similar statute, that it was competent to the court to which such judgment was removed to set it aside, if satisfied that it was obtained in a matter over which the inferior court had no jurisdiction.

A transcript may be issued notwithstanding the pendency in the Division Court of proceedings by way of judgment summons; but as soon as the transcript is issued and filed, the judgment summons proceedings cannot be continued. It is probably unnecessary to set out the proceedings subsequent to judgment, except the date of issuing execution and the bailiff's return of nulla bona: Ryan v. McCartney, 19 A. R. 423.

See Rules 160, 162.

Upon filing transcript County Court Clerk, judgment to be judg-ment of that Court.

- 221. Upon filing the transcript in the office of the in office of clerk of the County Court, in the county where the judgment has been obtained, or in the county wherein the defendant's or plaintiff's lands are situate, the same shall become a judgment of the County Court, and the clerk of the County Court shall file the transcript on the day he receives the same, and enter a memorandum thereof in a book to be by him provided for that purpose, which memorandum shall contain,
 - 1. The names of the plaintiff and defendant;
 - 2. The amount of the judgment;
 - 3. The amount remaining unsatisfied thereon; and
 - 4. The date of filing;

for which services the clerk of the County Court shall be entitled to demand and receive from the person filing the same the sum of fifty cents. R. S. O. 1877, c. 47, s. 166.

Upon filing the transcript.—The transcript must be "filed" before the proceedings constitute a judgment of the County Court; see Robson v. Waddell, 24 U. C. R. 574; Lee v. Morrow, 25 U. C. R. p. 610; Magrath v. Todd, 26 U. C. R. p. 90; Hunter v. Caldwell, E. T. 1847; Dwar. 673; Stroud, 282. See Rules 160-163. uld be no n a tranon in the

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It should be marked "filed" by the proper officer: Campbell v. Sections Madden, Dra. R. 2; but, see R. v. Gould, M. T. 3 V.

Judgment has been obtained .- That is the court where judgment was originally recovered: Burgess v. Tully, 24 C. P. 549.

The transcript may be filed either in the county court of the county in which the judgment was recovered or of that in which the judgment debtor's lands are situated. It is safer to file it with the clerk of the county court of the county in which the judgment has been obtained for if it afterwards appeared that the debtor had no lands in the county in which it was filed the whole proceedings would, within the principles of the cases cited in the notes to section 223, be void. Besides, in the event of requiring to prove a sale of the lands, the fact of the defendants having had lands in the county where transcript filed might have to be

It was held that if proceedings in the Division Court shew that no proper judgment could have been recovered in that court, such so-called judgment is void: per Moss, C.J., Samis v. Ireland, 4 A. R. 118, at p. 121.

And that by a writ of prohibition declaring that the county court had no jurisdiction, the judgment of that court becomes of no effect and cannot be enforced, and also invalidates the judgment entered in the superior court on a transcript from the inferior court: Labatt v. Chisholm, 2 West. L. T. 54.

A Judgment of the County Court.—See notes to section 212.

The defendant is liable to be examined as to his estate and effects on a judgment so recovered, and where in such a case he refused to attend for examination a ca. sa. against him was upheld, although the amount was under \$100: Kehoe v. Brown, 13 C. P. 549.

Perhaps in that case an order for commitment would have been the proper remedy: Wallis v. Harper, 7 U. C. L. J. 72; Henderson v. Dickson, 19 U. C. R. 592; Ward v. Armstrong, 4 P. R. 58.

Great care should be taken in the preparation of the transcript under these sections in view of the authorities referred so, and it should be carefully examined by the solicitor for the party issuing it before filing.

It may be unnecessary, in view of the authority of Daby v. Gehl, 18 O. R. 132, to issue a ft. fa. goods from the County Court, but it is safer

It was decided in Kehoe v. Brown, 13 C. P. 549, that the transfor to the County Court has not the effect of allowing proceedings against ands merely, but is for all purposes a judgment of that court; and in that view, it is submitted that the ordinary course of proceeding in the County Court had better be taken. But see 2 L. J. N. S. 53.

As to effect on Division Court suit, see Rule 161. For form of transcript see Form 99.

225. Such book shall at all reasonable hours be accest County sible to any person desirous of examining the same, upon Clerk's book to be the payment to the clerk of ten cents. R. S. O. 1877, c. 47, accessible.

s. 167.

The clerk of the County Court would be bound, upon the payment or tender of the fee here expressed, to allow the entry in such book to be examined by any person desirous of so doing, and his refusal to do so would subject him to mandamus or to indictment for malfeasance in office. See McNamara v. McLay, 8 A. R. 319; Re Webster and Registrar of Brant, 18 U. C. R. 87; Ross v. McLay, 26 C. P. 190.

Sections 226-228

ment in County Court.

226. Upon such filing and entry the plaintiff or defendant may, until the judgment has been fully paid may prose and satisfied, pursue the same remedy for the recovery thereof or of the balance due thereon, as if the judgment had been originally obtained in the County Court. R. S. O. 1877, c. 47, s. 168.

> Pursue the same Remedy. -- See 4 U. C. L. J. 275, and notes to sections 223, 224.

The interest of a mortgagoods mortgaged may be execution.

227. On any writ of execution against goods and chattels, the sheriff or other officer to whom the same is directed may seize and sell the interest or equity of redemption in any goods or chattels of the party against whom the writ has issued, and the sale shall convey whatever interest the mortgagor had in the goods and chattels at the time of the seizure. R. S. O. 1877, c. 47, s. 169.

The sheriff or other officer.—This includes a Division Court bailiff.

Equity of redemption.—See notes to sections 212 and 228, as to what may be seized by a bailiff or other officer under an execution from the Division Court.

It must be borne in mind that an indivisible interest in a chattel may be seized and so ... ander this section, and that such interest is not subject to the Bills of Sale Act, (R. S. O. c. 125), such Act being intended to apply only to the entire interest in a chattel: see Gunn v. Burgess, 5 O. R. 685; Cochrane v. Moore, 25 Q. B. D. 57.

On sale of the interest or equity of redemption in any goods or chattels under this section, the weight of opinion seems to be that the bailiff can only sell so as to give his vendee a right to stand in the position of the mortgagor only, and he cannot sell the goods themselves and transfer the possession to the purchaser: Squair v. Fortune, 18 U. C. R.

What may be seized under execution against goods and chattels.

228. Every bailiff or officer having an execution against the goods and chattels of any person, may by virtue thereof seize and take any of the goods and chattels of such person (except those which are by law exempt from seizure), and may also seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to such person. R. S. O. 1877, c. 47, s. 170.

Take any of the goods and chattels.—See notes to section 212.

Exempt from seizure.—A list of articles exempt from seizure will be found in notes to section 212, ante, pp. 299-301

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A bailiff would be a trespasser who seized and took any of the goods Section and chattels of the person against whom he had an execution which were by law exempt from seizure: see Re Gould v. Hope, 21 O. R. 624; Bagge v. Whitehead, (1892), 2 Q. B. 355.

Securities for money.—At common law bank notes or the securities mentioned in this section were exempt, but for Division Court purposes they are here made the subject of seizure.

This power only applies to moneys set apart and ear-marked: Wood v. Wood, 4 Q. B. 397. Money seized under an execution is exactly in the same position as money the proceeds of goods sold: Collingridge v. Paxton, 11 C. B. 683. Cheques were held to be seizable though in the hands of another, e.g., the Accountant-General of the Court of Chancery: Watts v. Jefferyes, 3 Mac. & G. 422. So also is a policy of life assurance: Stokoe v. Cowan, 30 L. J. Ch. 882. Any title deed, even if pledged with the debtor for a loan, or a letter or a guarantee for some collateral act, or any other deed or writing, which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot be taken. But it would seem that all instruments containing an unconditional covenant or agreement for payment of a specific sum of money to the execution debtor for his own benefit are within the words "other securities for money," and may be taken: Arch. Pract. 12th ed. 653. The word "money" here used means specific gold and silver coin, bank or government notes, and not debts due to the defendant: Harrison v. Paynter, 6 M. & W. 387. A surplus in the bailiff's hands, after satisfying a former execution, even at the suit of the same plaintiff, cannot be seized as money: Harrison v. Paynter, supra; Fieldhouse v. Croft, 4 East, 510; Sharpe v. Leitch, 2 L. J. N. S. 132; contrast R. S. O. c. 64, s. 17, which applies only to executions from the High Court and County Court. Nor would such money be stayed in the bailiff's hands to satisfy a present execution: Willows v Ball, 2 N. R. 376. Garnishment would be the remedy in that case: Lockart v. Gray, 2 L. J. N. S. 163. Money in the hands of a third person as trustee for the defendant cannot be seized unless it be the exact pieces of coin or paper of the defendant: Robinson v. Piece, 7 Dowl. 93; Wood v. Wood, 4 Q. B. 397; but see, per Osler, J.A., Sullivan v. Francis, 18 A. R. 121, 126, where it is said that a surplus after paying a landlord and mortgagee would be subject to the execution. So money deposited in court in one action cannot, when the defendant is entitled to have it paid out to him, be paid out to an execution creditor in a second action: France v. Campbell, 9 Dowl. 914; 6 Jur. 105, s. c. It would seem that money in a defendant s pocket no more than clothes on his back can be seized on execution: see Sunbolf v. Alford, 3 M. & W. 248. Books of account cannot be seized: McNaughton v. Webster, 6 U. C. L. J. 17. A money bond for the conveyance of land is seizable by a bailiff: R. v. Potter, 10 C. P. 39. So also is a fire policy after a loss has taken place and money has because payable thereon, even though the amount has not been ascertained: The Bank of Montreal v. McTavish, 13 Gr. 395. A license to sell liquors would not be exigible: Re Gilmer, 17 L. R. Ir. 1. The property mentioned in the latter part of this section is only bound from the seizure: McDowel v. McDowell, 10 U. C. L. J. 48: see also notes to section 212.

Where a mortgage of land registered under the Land Titles Act is seized, the bailiff must lodge with the Master of Titles a certificate of the seizure; 53 V. c. 32, s. 7. The bailiff cannot sell any security seized by him: Rumohr v. Marx, 2 C. L. T. 501; see as to powers of a sheriff, 52 V. c. 11, s. 2.

Bailiff to hold under execution for benefit of plaintiff.

229. The bailiff shall for the benefit of the plaintiff, hold any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money so seized or notes, etc., taken as aforesaid, as security for the amount directed to be setzed levied by the execution or so much thereof as has not been otherwise levied or raised, and the plaintiff, when the time of payment thereof has arrived, may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby. R. S. O. 1877, c. 47, s. 171.

> For the benefit of the plaintiff -The "plaintiff" here means the execution creditor. According to the ordinary rules of statutory construction and the Interpretation Act, and the word "defendant" could be read for the word "plaintiff" should the former be the execution creditor.

> Bailiff to hold securities.—After the bailiff has made the seizure, it would be advisable for him carefully to prepare a list of the securities seized, shewing their amounts, dates, when and by whom payable, and to give notices to the different persons liable on them of such seizure. He should also advise the execution creditor of what he has done, so that he might better determine whether he would proceed on them or not. As regards such securities as might not be due, their deposit in the clerk's safe, or some other safe depository, would be a prudent course for the bailiff to take. If the execution creditor should not within a reasonable time determine to take proceedings upon those overdue, and the others as they become due, it would be the duty of the bailiff to hand them back to the debtor, for should he be negligent in that respect, and the debts due upon such securities be barred by the Statute of Limitations, or lost otherwise, the bailiff and his sureties would undoubtedly be liable. Should the execution creditor's claim and all costs be satisfied out of the proceeds of the securities seized, or discharged in any other manner, it would then also be the duty of the bailiff to restore such of the securities as remained in his hands to the execution debtor. Bank stock could not be considered "money," or "other securities for money," within the meaning of this and the next preceding section: Ogle v. Knipe, L. R. 8 Eq. 434. Neither would shares in a building society or other corporation: Collins v. Collins, L. R. 12 Eq. 455. On this section generally, see 1 U. C. L. J. 181 and 182; Hopkins v. Abbott, L. R. 19 Eq.

> May sue in the name of the defendant.—As to the notice that should be added to the summons, see rule 15. The action must be brought ir the name of the defendant in the original suit, or in the name of any person in whose name the defendant might have sued: see 4 U. C. L. J. 226. If questioned, the proceedings justifying the action might have to be proved: McDonald v. McDonald, 21 U. C. R. 52. A defendant could not set up matters that occurred subsequently to the seizure and notice: Dennison v. Knox, 24 U. C. R. 119; Jeffs v. Day, L. R. 1 Q. B. 372; Watson v. Mid Wales Railway Co., L. R. 2 C; P. 593; Brighton Arcade Co. v. Dowling, L. R. 3 C. P. 175; Chishom v. Provincial Ins.

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The suit would be subject to all the equities between the execution debtor and the defendant: In re Matal Inv. Co., L. R. 3 Ch. 355; Rodger v. The Comptoir D'Escompte De Paris, L. R. 2 P. C. 393.

230. The defendant in the original cause shall not dis- Defendant charge such action in any way without the consent of the cause not to plaintiff or of the Judge. R. S. O. 1877, c. 47, s. 172.

Shall not Discharge such Action .- See notes to section 229. A discharge given after seizure and notice would be set aside as a fraud: Sargent v. Wedlake, 11 C. B. 732; Ex parte Games, 3 H. & C. 294; Rawstorne v. Gandell, 15 M. & W. 304.

This section preserves to the execution creditor the benefit of the seizure by preventing the discharge of such action which might in any way be obtained without his consent or of the Judge. His rights shall, therefore, stand as they existed at the time of the seizure, and no act of the execution debtor shall in any way prejudice them.

It is submitted that the execution creditor will be in much the same position as an assignee of a chose in action would be in after he had given notice to the debtor of the assignment to him.

231. The party who desires to enforce payment of a The party security seized or taken as aforesaid, shall first pay or enforce must secure all costs that may attend the proceeding; and the secure costs. moneys realized, or a sufficient part thereof, shall be paid over by the officer receiving the same to apply on the plaintiff's demand, and the overplus, if any, shall be forth-Overplus. with paid to the defendant in the original action, under the direction of the Judge. R. S. O. 1877, c. 47, s. 173.

Pay or secure all costs. -This is declaratory merely: Auster v. Holland, 3 D. & L. 740; Spicer v. Todd, 1 Dowl. 306; Lush's Prac. 3rd Ed. 225; De Colyar on Guarantees, 2nd ed. 48.

The overplus.-If more is realized than sufficient to pay the execution debt, the overplus, if any, must be forthwith paid to the defendant in the original action under the direction of the Judge; his order must be first obtained.

It was held that "overplus," as used in 2 W. & M. Sess. 1, c. 5, s. 2, means what remains after payment of the rent and reasonable charges of distress: Lyon v. Tomkies, 1 M. & W. 602; Knight v. Egerton, 7 Ex. 407; Stroud, 554.

232. The bailiff, after seizing goods and chattels by Bailiff virtue of an execution, shall indorse on the execution the goods to date of the seizure, and shall immediately, and at least indorse eight days before the time appointed for the sale, give and give public notice by advertisement signed by himself, and put sale.

Sections up at three of the most public places in the division where the goods and chattels have been taken, of the time and place within the division when and where they will be exposed to sale; and the notice shall describe the goods and chattels taken. R. S. O. 1887, c. 47, s. 174.

> After seizure.—See notes to section 212, and especially Gladstone v. Padwick, L. R. 6 Ex. 203. See also Hincks v. Sowerby, 4 A. R. 113; Whimsell v. Giffard, 3 O. R. 1, and cases there cited.

> Date of seizure.—See also notes to section 212. It is best to endorse not only the day of the month, but the hour of the day on the execution.

> At least eight days.—This means clear days, i.e., excluding the day of posting the advertisement, as well as the day of the sale: see note to section 96, p. 129 ante.

> The advertisement should be put up immediately after the seizure: see note to section 112, ante p. 162.

> Three most public places. - The policy of the law is to realize as much as possible out of the defendant's goods; and for that reason, the statute prescribes the most public form of advertisement.

> Notice of sale.—Any irregularity in the publication of the notice, or even the absence of notice, would not invalidate the sale, provided it was honestly conducted in other respects; but it would subject the bailiff to an action: Campbell v. Coulthard, 25 U. C. R. 621; Paterson v. Todd, 24 U. C. R. 296; McDonald v. Cameron, 13 Gr. 84; Shultz v. Reddick, 43 U. C. R. 155; Trent v. Hunt, 9 Ex. 14; see section 28θ.

> The notice must be signed by the bailiff himself to be in strict conformity with the section.

> Even a lithographed signature would be insufficient: R. v. Cowper, 24 Q. B. D. 60, 533; and it is submitted that a signature by a clerk or assistant would not be in conformity with the section: Monks v. Jackson, 1 C. P. D. 683; R. v. Jones, 23 Q. B. D. 29; see, however, France v. Dutton, (1891), 2 Q. B. 208.

> A failure to comply with the provision would not, however, involve any serious consequences, unless, perhaps, it could be shewn that by reason of the absence of the signature, the sale was considered fictitious, and buyers did not, therefore, attend.

> The notice should be of such a character as to give intending purchasers and others reasonable information of what is to be sold, and of the time and place of sale.

Goods not to be sold till eight days after seizure.

233. The goods so taken shall not be sold until the expiration of eight days at least next after the seizure thereof, unless upon the request in writing under the hand of the party whose goods have been seized. R. S. O. 1877, c. 47, s. 175.

Shall not be sold until the Expiration of eight days.—If sold before the eight days, the sale would not be void, but only irregular: see notes to section 232. But if the debtor suffered any damage in consequence, the bailiff and his sureties would be responsible: Schultz v. Reddick, 43 U. C. R. 155, 161.

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The measure of damages would be the real value of the goods, less the Section amount of execution: Ib.

Pending the sale, the goods are at the risk of the bailiff. "If the sheriff seize goods he is liable for them, no matter what becomes of them, and whether he sells or not the judgment debtor, after the seizure, is discharged as to the plaintiff and he is not liable to a second execution, and he may plead the taking in discharge of himself:" Bac. Abr. Execution (D); Clerk v. Withers, 2 Ld. Raymd. 1074; Ross v. Grange, 25 U. C. R. 396.

Any person who takes or causes to be taken, without lawful authority, goods under seizure is guilty of felony: R. S. C. c. 164, s. 50; Criminal Code, (1892), s. 306.

Request in writing.—In view of the positive prohibition contained in the section it is doubtful if a sale could take place without a written consent. Ordinarily a person may waive a provision intended for his benefit, and such waiver may be in writing or by words or conduct: Girvin v. Burke, 19 O. R. 204. In this case the statute expressly provides that the waiver must be in writing. A mere submission to the injury, or a voluntary promise after the sale, not to seek redress, would be insufficient. After the injury had been committed, a release, or accord and satisfaction, would have to be shewn: per Thesiger, L.J., De Bussche v. Alt, 8 Ch. D. at p. 314.

The bailiff should stop the sale as soon as sufficient money is raised: Cook v. Palmer, 6 B. & C. 739.

The sale is for ready money and immediate delivery, and the bailiff is not justified, after he has sold as much as will apparently satisfy the execution, in selling more, on the speculation that the actual delivery of the goods sold may be prevented by loss or accident: Aldred v. Constable, 6 Q. B. 370.

The goods must be sold within a reasonable time or an action by the creditor will lie: Bales v. Wingfield, 2 N. & M. 831; Jacobs v. Humphrey,

The sale need not be by public auction; but it seems the bailiff must bear any expense in selling in any other way: Phillips v. Canterbury, 11 M. & W. 619.

The bailiff must no sell goods for much below their real value: Keightley v. Birch, 3 Camp. 521.

Should an execution, in the meantime, have issued to the sheriff, he would be entitled, under R. S. O. c. 65, s. 25, to demand the goods, and the bailiff would be bound to deliver them; but would then, under 52 V. c. 12, s. 7, be entitled to have his fees taxed by the clerk and paid by the sheriff on demand: see notes to section 212, ante p. 303; but these fees would not include poundage: R. v. Ludmore, 13 Q. B. D. 415. If no demand was made for the goods, the bailiff might sell them: Woolford's Estate (Trustee of) v. Levy, (1892), 1 Q. B. 772.

Should the execution debtors be a company, any execution put in force after the making of a winding up order would be void: R. S. C. c. 129, s. 17; and after a resolution or order for winding up by the members under R. S. O. c. 183, and amendments, the remedy for a debt is not by seizure, but by an order on petition to the County Court: R. S. O. c. 183, s. 19, sub-sec. 7; see Westbury v. Twigg, (1892), 1 Q. B. 77.

Sections 234-235

Bailiff and other officers chase goods seized

234. No clerk, bailiff or other officer of a Division Court shall, directly or indirectly, purchase any goods or chattels at any sale made by any Division Court bailiff not to pur- under execution, and every such purchase shall be absolutely void. R. S. O. 1877, c. 47, s. 176. See also c. 16, s. 27.

> Directly or indirectly purchase. - This section is only declaratory of the common law. No person who has, as a public officer, the sale of any goods or chattels, could either directly or indirectly be the purchaser thereof. The bailiff is in the nature of a trustee, and it would never do to allow selfish interest to conflict with public duty: see King v. Eng. land, 4 B. & S. 782; Williams v. Grey, 23 C. P. 561.

> The words "directly or indirectly" used here mean, either by himself or some secret agent on his behalf. It has been held that the addition or omission of these words to an offence was immaterial: Todd v. Robinson, 14 Q. B. D. 739, at p. 746; but see Stewart v. Macdonald, 11 L. J. N. S. 19.

> The sale to an officer, or to a person for him, is void, and passes no property; and the debtor would be entitled to maintain replevin or trover against the party in possession of the goods: Cundy v. Lindsay, 3 App. Cas. 459.

> The execution debtor might also, perhaps, maintain an action against the officer and his sureties for misconduct, and recover any expenses he had been put to in recovering the goods: see Salford (Mayor of) v. Lever, 25 Q. B. D. 363; (1891), 1 Q. B. 168.

EXAMINATION OF JUDGMENT DEBTORS.

Judgment debtors may be examined at the instance of their creditors.

235. A party having an unsatisfied judgment or order in a Division Court, for the payment of any debt, damages or costs, may procure from the court wherein the judgment has been obtained, if the defendant resides or carries on his business within the county in which the division is situate, or from any Division Court into which the judgment has been removed under section 217 of this Act and within the limits of which Division Court the defendant resides or carries on his business, a summons in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and the summons may be served either personally upon the person to whom the same is directed, or by leaving a copy thereof at the house of the party to be served or at his usual or last place of abode, or with some grown person there dwelling, requiring him to appear at a time and place therein expressed, to answer such things as are therein named, and if the defendant appears a Division y goods or ourt bailiff e absolute-. 16, s. 27.

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- 1. That the judgment remains unsatisfied in the whole or in part;
- 2. That the deponent believes that the defendant sought to be examined is able to pay the amount due in respect of the judgment or some part thereof; or,
- 3. That the defendant sought to be examined has rendered himself liable to be committed to gaol under this Act. R. S. O. 1877, c. 47, s. 177; 43 V. c. 8, s. 59; 45 V. c. 7, s. 5.

Examination of Judgment Debtors .- This section was taken originally from the English statute, 9 & 10 V. c. 95, s. 98, so that the English cases upon that statute will apply equally to this

The right to commit a judgment debtor in the English County Courts is now given by section 5 of the Debtors' Act, 1869; 32 & 33 V. c. 62.

An assignee having an unsatisfied judgment would not be entitled to issue a judgment summons without reviving: East End Buildg. Socy. v. Slack, 60 L. J. Q. B. 359.

Debt, damages, or costs.—An examination may be had under this section for costs, only. The debt or damages, or costs, being more than \$100, does not prevent an examination: Byrne v. Knipe, 5 D. & L. 659.

Judgment has been obtained.—The summons may issue from the court in which judgment has been obtained, if the judgment debtor resides or carries on his business within the county in which that court is situated; but if he resides or carries on his business in another county the summons must issue from the court within the limits of which he resides, upon a transcript thereto under section 217. See Rule 7.

It is not necessary that execution should issue before this proceeding can be resorted to: Peck v. McDougall, 27 U. C. R. 360.

If such a proceeding should be vexatiously taken, it is probable the judgment creditor would be visited with the costs of it.

Where proceedings in the suit were served upon the wrong man, who disregarded them, and a judgment summons was issued and an order for commitment made, and the party imprisoned, the plaintiff was held liable for false imprisonment: Walley v. McConnell, 13 Q. B. 903.

Resides or carries on business.—See notes to section 81.

A Summons.—This does not apply to a corporation, nor can the directors or officers be examined under this section: Dickson v. Neath & Brecon Ry. Co., L. R. 4 Ex. 87.

The process authorized by this section is in the nature of limited execution in the nature of a ca. sa. Its object being to get the money by coercing the person of the debtor: Ex parte Dakins, 16 C. B. 77.

A judgment against the separate estate of a married woman will not authorize her committal, and, it seems, it will not authorize her examination: In re McLeod v. Emigh, 12 P. R. 450; Scott v. Morley, 20 Q. B. D. 120; nor will it authorize an order for payment in instalments out of income which she is restrained from anticipating, though since the judgment she has received income: Morgan v. Eyre, 20 L. R. Ir. 541; but on such a judgment in the High Court or County Courts, a married woman might be examined and might be committed for not attending or not answering questions, the punishment being for contempt and not by way of execution: Metrop. Loan & Savings Co. v. Mara, 8 P. R. 355; Pearson v. Essery, 12 P. R. 466; Watson v. Ont. Supply Co., 14 P. R. 96. Under the English County Court Rules, 1892, the married woman may be examined as to what separate estate she has: Aylesford v. G. W. Ry. Co., 8 T. L. R. 786, (1892), 2 Q. B. 626.

On a judgment against a firm, only persons who are in fact partners, are liable, and no right exists to examine a person who might have been made liable by holding himself out as a partner: Re Young v. Parker & Co., 12 P. R. 646.

Any member of a firm against whom execution might issue, might be proceeded against by judgment summons: see notes to section 108, subsection 4: Taylor v. Cook, 11 P. R. 60.

A summons under this section, and one for the commencement of the action, cannot issue together: Bishop v. Holmes, 4 U. C. L. J. 235; see section 246.

A creditor's rights against a married woman debtor, are determined by the statute at the time the debt is contracted, and cannot be enlarged by the debtor subsequently becoming a widow: In re McLeod v. Emigh, 12 P. R. 450.

Service of judgment summons.—As to service see Rule 85 and sections 99 and 111 and notes thereto. It will be observed that the language of this section differs from that used in section 99. Under this section service would probably be considered good, if a copy was simply "left at the house" of the defendant; but it would be advisable for the bailiff, in all cases where personal service could not be effected, and where there might be some grown up person residing at the defendant's last place of abode, to serve that person. The affidavit of service may be in the form following:

(Style of cause.)

"That I did on the day of , A.D., 189 , serve (C.D.) the above-named defendant in this cause with the annexed (or within) summons, by delivering a true copy thereof to and leaving it with (E.F.) he (or she) then being a grown person dwelling at the usual (or last) place of abode of the said defendant, at the of

If the summons cannot be served a return with the reason in writing must be made by the bailiff: see Rule 90.

It was held that in serving defendant with an order to examine him as a judgment debtor, it was not necessary in order to obtain a ca. sa. to

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Last place of abode.—This would not justify service upon a person, who had left the Province and taken up his abode elsewhere, at his last place of abode in the Province: R. v. Farmer, (1892), 1 Q. B. 637; but if he went away with the intention of returning, or for the purpose of avoiding service, his residence before leaving would be his last place of abode: Ex parte Rice Jones, 1 L. M. & P. 357; 19 L. J. M. C. 151.

At a time and place.—"There is nothing in either the language used or the context to shew that the examination is to be made in the Judge's chambers at the County Town, and it would be a great hardship to bring parties there for the purpose if a discretion existed. But it does not. The party is summoned to be and appear at the place where the court is held, in the division in which it issues; and there is no authority to require him to appear elsewhere, for the order in respect to the matter must be entered by the clerk in like manner as any other order of the Court:" 9 U. C. L. J. 101.

Touching his estate and effects.—A defendant under judgment summons is bound virtually to give a full exposition of his affairs: Republic of Costa Rica v. Strousberg, 16 Ch. D. 8; see section 239.

The debtor must furnish such information about his affairs as will place his dealing in intelligible shape. It is not enough for him to say he does not know if he has the means at hand to qualify himself to explain: Foster v. VanWormer, 12 P. R. 597.

It is submitted that the examination of the judgment debtor is not restricted to the period of contracting the debt, but that it may be shewn at some anterior time, no matter how far back the debtor had property, as to which he may be required to give an account: Ontario Bank v. Mitchell, 32 C. P. 73.

Disposal he has made of any property.—See notes to section 240.

Affidavit for summons.—It is important to consider the condition on which the summons can issue under this section. An affidavit must be made and filed as required by this section. It must be made "by the plaintiff, his solicitor or agent." A stranger could not make it: Herschfeld v. Clarke, 11 Ex. 712; Christopherson v. Lotinga, 15 C. B. N. S. 809; Barwick v. De Blaquiere, 4 P. R. 267; Tiffany v. Bullen, 18 C. P. 91; Frederici v. Vanderzee, 2 C. P. D. 70; Bank of Montreal v. Cameron, 20 B. D. 586.

As the right to examination of a debtor depends on the making, by one of the persons mentioned in this section, of this affidavit and the due filing of it, care should be taken to see that such is done. This is more important in cases where the defendant does not appear, for should an order of commitment be made against him, and enforced without these requirements being first complied with, the Judge, clerk and execution creditor, would probably be liable as trespassers: see notes to section 249; and prohibition might be granted: Re McGregor v. Norton, 13 P. R. 223.

Shou'd the defendant appear and submit to examination, he would thereby waive the making or filing of this affidavit, and an order could be made against him just in the same way as if the affidavit had been properly made and filed: see R. v. Hughes, 4 Q. B. D. 614; Dayfoot v. Byrens, 7 C. L. T. 21.

It is doubtful if prohibition would go on a defective affidavit: In re Sato v. Hubbard, 8 P. R. 445.

For forms of affidavit see Forms post.

See notes to section 240.

Sections 236-239

Ezamination of witnesses. 236. The person obtaining the summons and all witnesses whom the Judge thinks requisite, may be examined upon oath, touching the inquiries authorized to be made as aforesaid. R. S. O. 1877, c. 47, s. 178.

Witnesses whom the Judge thinks requisite.—Where the defendant cannot or will not give a full account of his circumstances, or where his evidence is intended to be contradicted, other witnesses may be called to shew the facts. The Judge, however, has a discretion whether he will hear the plaintiff or his witnesses. But the ordinary rules for dealing with litigated matters, where money or money's worth only are involved, are not to be applied, without more, to cases where the liberty of the person is at stake: Graham v. Devlin, 13 P. R. 245.

The examination to be in Judge's chamber.

237. The examination shall be held in the Judge's chamber, unless the Judge otherwise directs. R. S. O. 1877, c. 47, s. 179.

In the Judge'r chamber.—See notes to section 235 ante p. 323.

Without this provision the examination would have to be held in open court: Nagle-Gillman v. Christopher, 4 Ch. D. 173; Kenyon v. Eastwood, 57 L. J. Q. B. 455. "The simple object of the enactment is to prevent needless exposure in open court, and to give authority to hold the examination in private; and the practice in every court we have knowledge of is to allow the general public to depart after the ordinary business is over, and to make the court room the Judge's chamber for the time being." 9 U. C. L. J. 101.

Costs.

238. The costs of the summons and of all proceedings thereon shall be deemed costs in the cause, unless the Judge otherwise directs. R. S. O. 1877, c. 47, s. 180.

Costs in the cause.—Costs in the cause mean the costs of the ordinary proceedings in a suit: Cameron v. Campbell, 1 P. R. p. 173.

Unless the Judge otherwise directs.—Where proceedings are taken in a cause vexatiously or wantonly, or without any reasonable prospect of eliciting anything favourable to the creditor, it is submitted that the Judge would exercise a reasonable discretion in refusing costs.

Party examined and discharged not to be again summoned.

Exception.

239. In case a party has, after his examination, been discharged by the Judge, no further summons shall issue out of the same Division Court at the suit of the same or any other creditor, without an affidavit satisfying the Judge upon facts not before the court upon the examination, that the party had not then made a full disclosure of his estate, effects and debts, or an affidavit satisfying the Judge that since the examination the party has acquired the means of paying. R. S. O. 1877, c. 47, s. 181.

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No further summons shall issue.—That is, a summons of the same Sections character.

At the suit of the same or any other creditor, -It is no part of the clerk's duty to know whether or not a summons is in violation of this section. The debtor should bring it to the Judge's notice. He might move to set aside the summons, and, perhaps, might move for prohibition. Neither course should, however, be adopted until the fact of the prior discharge has been brought to the plaintiff's notice, and an opportunity given him to withdraw the summons.

Has acquired the means of paying.—There are two grounds upon which the Judge would be warranted in granting an order for another

The section does not apply to a summons from another Division Court, but to the case of any other creditor in the same court.

What might be considered a full "disclosure" is a matter of some doubt. It could hardly be said that a debtor should voluntarily make such disclosure as this section contemplates, but it would appear to the writer that if he made such full disclosure concerning matters upon which the plaintiff thought proper to examine him it would be a compliance with this section. If a plaintiff should adopt the latter alternative of the section, the affidavit should clearly shew what means, if any, the defendant has acquired of paying the debt since the examina-

240. If the party so summoned—

Conse-

- 1. Does not attend as required by the summons, or neglect or refusal to allege a sufficient reason for not attending; or
- 2. If he attends and refuses to be sworn or to declare any of the things aforesaid; or
- 3. If he does not make answer touching the same to the satisfaction of the Judge; or
- 4. If it appears to the Judge, either by the examination of the party or by other evidence, that the party,
 - (a) Obtained credit from the plaintiff or incurred the debt or liability under false pretences, or by means of fraud or breach of trust; or
 - (b) [Struck out by 51 V. c. 10, s. 3;]
 - (c) Has made or caused to be made any gift, delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or
- 5. If it appears to the satisfaction of the Judge that the party had when summoned, or, since the judgment was obtained against him, has had sufficient means and ability

Section 240

to pay the debt or damages, or costs recovered against him, either altogether or by the instalments which the court in which the judgment was obtained has ordered, and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the Judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days. R. S. O. 1877, c. 47, s. 182; 51 V. c. 10, s. 3.

Does not attend.—The Judge should see that the defendant has been properly called upon to appear on the summons before proceeding. The affidavit of service should be duly entitled in the court and cause under Rule 133. It should also shew that the judgment debtor has been served "ten days at least before the day on which the party is required to appear:" Rule 85. By the same rule, service any time before the day appointed for the appearance of the debtor "may be deemed by the Judge to be good service, if it shall be proved to his satisfaction that such party was about to remove out of the jurisdiction of the court."

Sufficient reason.—It is submitted that inability to pay expenses is not a sufficient reason for not attending: Contrast, C. R. 930.

Illness, it is submitted, would be: Re Jacobs, 1 Har. & W. 123; Boast v. Firth, L. R. 4 C. P. 1; Robinson v. Davison, L. R. 6 Ex. 269; R. v. Wellings, 3 Q. B. D. 426. See section 241.

Unsatisfactory answers.—In Crooks v. Stroud, 10 P. R., 131, it was held that a satisfactory answer upon an examination as a judgment debtor, according to the then statute (R. S. O. (1877), c. 50, s. 305), meant more than that the answer should be a full, proper and pertinent answer to the question. It seems that the answer should show a satisfactory disposition of the property, and that the illegal and wrongful disposition of his money by gambling, horse-races or otherwise should be disclosed, and would be unsatisfactory: see MoInnes v. Hardy, 7 U. C. L. J. 295.

But in Hobbs v. Scott, 23 U. C. R. 619, it was said, that the word unsatisfactory" could not be interpreted in that sense; and the latest test suggested is: are the answers sufficient to satisfy a reasonable person that full and true disclosure has been made? Graham v. Devlin, 13 P. R. 245.

An answer in which the person declares his ignorance or obliviousness of a transaction of which it is manifest he cannot be ignorant or oblivious, is "unsatisfactory:" Ex parte Bradbury, 14 C. B. 15.

Where a debtor did not, in his examination, give a full explanation for want of knowledge, he was ordered to qualify himself by obtaining full knowledge of all his transactions: Foster v. Van Wormer, 12 P. R. 597; see also, Lemon v. Lemon, 6 P. R. 184; Schneider v. Agnew, 6 P. R. 388.

Fraud or breach of trust.—Credit must have been obtained, or the debt incurred by false pretences, and strict legal proof of it must be given: see 3 U. C. L. J. 196.

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"In ordinary parlance, we speak of obtaining money or property by false pretences as indicating the criminal offence of obtaining the same by false pretences with intent to defraud:" per Harrison, C. J., Crawford v. Beattie, 39 U. C. R. at p. 29.

The debtor must, at the time of obtaining credit, have knowingly made a false statement of past or present fact, and the creditor must have been induced to give credit by relying on such statement: Criminal Code, 1892, s. 358.

A "breach of trust" would be the non-payment of money which the defendant had received for the plaintiff upon any express or implied trust. An auctioneer would fall within this category: Crowther v. Elgood, 34 Ch. D. 691; Criminal Code, 1892, s. 363.

As to fraudulent acts justifying commitment, see 4 U. C. L. J. 12, 61; 9 U. C. L. J. 121; Winks v. Holden, 1 L. J. N. S. 100.

Paragraph (b) of sub-section 4, which read thus: "Wilfully contracted the debt or liability without having had at the time a reasonable expectation of being able to pay or discharge the same," was struck out by 51 V. c. 10, s. 3.

Gift, delivery, or transfer of any property.—The property may be either real or personal: Kidd v. O'Connor, 43 U. C. R. 193.

This paragraph of the sub-section also describes a criminal offence: R. S. C. c. 173, s. 28; R. v. Henry, 21 O. R. 113; Criminal Code, 1892, s. 368.

A transfer which merely amounted to a preference, would not be within this provision: May on Fraudulent Conveyances, 100.

Sufficient means and ability to pay.—This must mean with reference to the necessities of the debtor and his family. Equitable estate can be looked at for the purpose of determining if the debtor has had sufficient means: Bennett v. Powell, 1 Jur. N. S. 719.

Where the debtor lived in good style as a country gentleman, but his horses, carriages, etc., all belonged to his wife, an order for his committal was, nevertheless, affirmed: Harper v. Scrimegeour, 5 C. P. D. 366. But this was a decision upon a mere question of fact, and is not binding on any court; and the onus is upon the creditors to prove sufficient means: Chard v. Jervis, 9 Q. B. D. 178. See also, 18 L. J. N. S. 390; Re Ross, 29 Gr. 385; Dillon v. Cunningham, L. R. 8 Ex. 23; Esdaile v. Visser, 13 Ch. D. 421; Newell v. Van Praagh, L. R. 9 C. P. 96: Debeuham v. Wardroper, 48 L. T. N. S. 235.

Altogether or by instalments.—Power is given by sections 145 and 245 to order the payment of a judgment by instalments.

The Judge must adjudicate, in case no order has been made for payment in instalments, that the debtor has had sufficient means and ability to pay the judgment.

An order cannot be made that the debtor pay the debt by a certain time or in instalments, or in default be committed: Chichester v. Gordon, 25 U. C. R. 527; Re Woltz v. Blakely, 11 P. R. 430; R. v. Judge of Brompton County Court, 18 Q. B. D. 213.

But if the Judge adjudicates that the defendant has had means, he may order his commital, but may suspend the issue of the order and direct that it shall not issue if the defendant pay the debt or instalments: Stonor v. Fowle, 13 App. Cas. 20

The Judge may if he thinks fit.—See note to section 8, ante, page 5; mote to section 168, ante, page 241.

Section 240 Section 240 Order such party to be committed.—If the Judge orders a party to pay the money at a future day, or in default to be committed, and the party again makes default, he cannot be committed without an opportunity of being heard as to the cause of such default: Abley v. Dale, 10 C. B. 62; see ex parte Kinning, 4 C. B. 507; Kinning v. Buchanan, 8 C. B. 271; Baird v. Story, 23 U. C. R. 624.

Judgment for debt and costs was given against B., and an order made to pay by instalments. B. made default, and a judgment summons was issued, upon which he was examined and committed for seven days, upon the ground that he had the means of satisfying the judgment and refused to do so. He was subsequently summoned and committed two several times for forty days, each on the same ground. Held, that there was power to commitfor default of the same kind is often as default is committed: Boyce, In re, 2 E. & B. 521. A we rant of commitment, stating that "it appeared to the satisfaction of the Judge that the defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery or transfer of his property, with intent to defraud his creditors, and thereupon the Judge by a certain order did adjudge, &c.," not being in the nature of a conviction, is not bad for stating in the alternative the modeby which the offence was committed: Purdy, Ex parte, 9 C. B. 201. Where a defendant does not attend on judgment summons, and a warrant of commitment is issued in consequence, payment made to the plaintiff will prevent the execution of the warrant: Dakins, Ex parte, 16 C. B. 77; Re McLeod v. Emigh, 12 P. R. 450. An order on which a warrant of commitment was founded, that defendant pay the debt at a future given day or be imprisoned for thirty days, was held bad: Dews v. Riley, 11 C. B. 434; 4 L. C. G. 65. It follows from Abley v. Dale, 10 C. B. 62, and the case just quoted of Dews v. Riley, that if the Judge postpones the ordering of commitment of the defendant after examination, he must have an opportunity of being again heard: see also Bullen v. Moodie, 13 C. P. 126; 2 E. & A. 379, s. c.; In re Hicks, 5 P.R. 88. But if in the presence of the defendant, the Judge orders his commitment, then there is no necessity for any other summons: Baird v. Story, 23 U. C. R. 624. One who does not reside or carry on business in this was ince could not be committed : Regan v. McGreevy, 5 P. R. 94. At all of commitment upon nonpayment cannot be embodied in the orginal order to pay: Exparte Kinning, 4 C. B. 507; see further notes to Paul 101; see Thorpe v. Browne, 101; see Thorpe v. Browne, L. R. 2 H. L. 220; R. v. Oxford, L. R. 7 . B. 471; notes to sections 81,

Where an order was made to commit the defendant to prison in default of payment of amount due on a judgment, but he was never arrested nor imprisoned under the order which, under the English County Court Rules, expired a year from its date: Held, upon motion for prohibition that as no arrest nor imprisonment had ever taken place upon this order before its expiration, and as the defendant was still in default, the County Court Judge had power to make a second order of commitment: R. v. Stonor, 59 L. T. N. S. 669; 57 L. J. Q. B. 510. As to life of warrant under our Division Courts Act, see Rule 101.

Where a plaintiff had compounded with a debtor, it was held that the default in payment of the composition was to remit the plaintiff to the position he occupied before the proceedings in respect of the composition, and that consequently where an order had been made for payment by the defendant proceedings could be taken on such order for non-compliance with it on such default: Newell v. Van Praagh, L. R. 9 C. P. 96.

As to what is meant by the term "visible means," see Lee v. Parker, 13 Q. B. D. 835.

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By the express terms of this section, the case of Evans v. Wills, 1 Sections C. P. D. 229, would not apply, and the debtor could be committed more

The jurisdiction of the superior courts in reviewing committals by an inferior court, is limited to the consideration whether there were materials upon which the Judge ordering the committal could have reasonably inferred contempt, and whether the form of committal is in accordance with the forms laid down in the section: R. v. Jordan, W. N. (1888), 152: 36 W. R. 589, 796.

An order of committal should state in what particular the person committed was guilty of default: R. v. Lambeth, C. C. Judge, 36 W. R. 475; but this applies only to the formal order, and not to a mere minute made on the pronouncement of the decision: Harris v. Slater, 21 Q. B. D.

For Form of Order, see Schedule of Forms. For Forms of Warrant, see Forms, 93, 94.

241. A party failing to attend according to the re- In what quirements of such summons, shall not be liable to be com- the party summoned mitted to gaol for the default, unless the Judge is satisfied may be committed that such non-attendance is wilful, or that the party has attend. failed to attend after being so summoned; and if at the allowed hearing it appears to the Judge, upon the examination of certain the party or otherwise, that he ought not to have been so cases. summoned, or if at the hearing the judgment creditor does not appear, the Judge shall award the party summoned a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment creditor in the same manner as any other judgment of the court. R. S. O. 1877, c. 47, s. 183; 43 V. c. 8, s. 60.

Such non-attendance is wilful.—It is often a difficult matter to determine when a defendant's failure to attend is the wilful non-attendance. It is also difficult to say whether a Judge should receive evidence affirmatively shewing that fact, or whether the non-attendance is prima facie evidence of its being "wilful." It has been said that "wilful, is a word of familiar use in every branch of the law, and although in some branches of law it may have a special meaning, it generally, as used in Courts of Law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent": per Bowen, L.J., Re Young and Harston, 31 Ch. D. 174; see also Squire v. Wheeler, 16 L. T. N. S. 93; Carpenter v. Mason, 12 A. & E. 629. But it has been said, also, that the word "wilfully" is sometimes used as denoting evil intention; in fact that such is the common use of the word in the English language, and that a surveyor was not guilty of the offence of "wilfully receiving" a higher fee than he was entitled to when acting under an honest mistake: R. v. Badger, 6 E. & B. 137; Smith v. Barnham, 1 Ex. D. 419; Miles v. Roe, 10 P. R. 218.

Sections 241-242 After being so summoned.—Formerly the section required the judgment debtor to be twice summoned; but a second judgment summons is now unnecessary. Nothwithstanding the provisions of section 235, in regard to the service of the judgment summons, bailiffs should in all cases use their best endeavours to effect personal service, and should only make service at the debtor's house when they have exhausted all reasonable efforts to effect personal service. The consequences of not attending on a judgment summons are now so serious to a defendant, that his liberty should not be dependent on the contingency of his attention being called to the summons by some one else.

Compensation for his trouble and attendance.—If a creditor, knowing that his debtor has been unfortunate, or if when the summons was issued he knew that the debtor had no means beyond what afforded himself and family a scanty subsistence, or under other circumstances of a like character, nevertheless has the debtor summoned under section 240, and the Judge makes no order, it is submitted that a wise discretion would be exercised in making the creditor pay the debtor for his trouble and attendance under this section, and also bear the costs of the proceedings under section 238.

The words "shall award" appear to leave the Judge no discretion if application is made, but are imperative. The Judge could probably award the debtor "a sum of money by way of compensation" if there should be a violation of section 239. This is mentioned as an instance. There may be others, no doubt.

Commitment in case of refusal. 242. Where an order of commitment as aforesaid has been made, the clerk of the court shall issue, under the seal of the court, a warrant of commitment directed to the bailiff of any Division Court within the county, and the bailiff may by virtue of the warrant take the person against whom the order has been made. R. S. O. 1877, c. 47, s. 184.

Order of Commitment.—The Judge's endorsement on the judgment summons was held to be the order upon such summons, and a subsequent order was held to be illegal: In re McLeod v. Emigh, 12 P. R. 450; R. v. Judge cf Brompton, C. C., 18 Q. B. D. 213; S. C. sub nom Stonor v. Fowle, 13 App. Cas. 20: but minute taken by the clerk would not be the order, and the order may be drawn subsequently to its pronouncement: Harris v. Slater, 21 Q. B. D. 359.

Warrant of Commitment.—The clerk should, in issuing the warrant, be careful to see that three calendar months from the date of the entry of the order of commitment in the procedure book have not expired: Rule 101; Hayes v. Keene, 12 C. B. 233.

If they have, he would, in the event of the debtor's arrest be liable as a trespasser: Lawrenson v. Hill, 10 Ir. C. L. R. 177; Pedley v. Davis, 10 C. B. N. S. 492; but see Ex parte O'Neill, 10 C. B. 57.

The warrant must, in addition to being under seal, be dated, otherwise the arrest would be illegal: In re Fletcher, 1 D. & L. 726; see Forms 93 and 94.

On motion to discharge a prisoner from gaol it was held that the Habeas Corpus Act of Ontario, R. S. O. c. 70, s. 1, enables a person confined under civil process to obtain the writ; and that a warrant of commitment which did not shew that it appeared to the satisfaction of the Judge that the debtor had sufficient means to pay the debt or damages,

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s held that the s a person convarrant of comistaction of the ebt or damages, by instalments, which the court had ordered, was defective, and that the Section debtor could not be imprisoned for non-payment or disobedience of the order to pay: Re Gesner, per Osler, J., (not reported). See also, R. v. Lambeth, C. C. Judge, 36 W. R. 475.

The Bailiff of any D. C. within the County: - The warrant need not be executed by the bailiff of the court from which it issues. The bailiff of any court within the county has equal power to do so. But the warrant should be directed to the bailiff who is to execute it.

But it would seem from this and the next succeeding section that the debtor could only be arrested within the county where the warrant

Take the person.—" On receiving a warrant, the officer should see that it has the seal of the court and the signature of the clerk; and further, if a commitment for contempt, that it also has the seal and signature of the Judge to it. The arrest may be made at any time of the day or night, but must not be made on a Sunday: "4 U. C. L. J. 62; 29 Car. II. c. 7, s. 6. If the debtor is ordered to be committed any time after examination, and the bailiff is negligent in executing the warrant, he and his sureties would no doubt be liable: see 4 U. C. L. J. 62.

The following is a very good guide to a bailiff as to his duties in executing a warrant: "The bailiff will not be justified in breaking open the outer door of a person's dwelling house to execute a warrant, nor indeed in the use of any force to effect an entrance, even to the breaking of a latch:" 5 Coke, 92.

An arrest under such circumstances would be void, and render the bailiff liable to an action: see Hodgson v. Towning, 5 Dowl. P. C. 410; but, having once got in, he may break any inner door; so he may break open the outer door of a barn, stable or out-house. But what has been said before as to executions against goods will apply in this particular to the execution of warrants; and the caution is repeated, that even when force is necessary, a demand for admission should be first made, and all fair means resorted to before force is employed. Although an officer having reason to believe that a party is in his house, may peaceably enter to arrest him, yet he cannot justify even a peaceable entry into the house of a stranger, except by proof that the party was actually there: Cook v. Birt, 5 Taunt. 765; Johnson v. Leigh, 6 Taunt. 246. If after being once arrested, the party escape and shelter himself in the house of another, the bailiff may enter and take him, provided it be done on fresh pursuit: Coke, 92. The bailiff should always keep this in his mind, that if a defendant escape from custody through his negligence or want of precaution, he will be liable to plaintiff; it may be, to the whole extent of the claim: 4 U. C. L. J. 62, 63. "To constitute an arrest, the party should, if possible, be touched by the officer; bare words will not make an arrest without laying hold of the person or otherwise confining him. But if a bailiff come into a room and tell a party he arrests him and locks the door, this is an arrest, for he is in the custody of the bailiff; or if in any other way the party submit himself by word or action to be in custody, it is an arrest. The bailiff, whether known as such or not, ought to produce his warrant if required; but should in no case part with the possession of it. If the party snatch or take the warrant, the bailiff may force it from him, using no unnecessary violence in so doing. As in case of a constable where resistance is made, the utmost caution and forbearance should be used; but the bailiff may lawfully use force to overcome resistance that force not exceeding the necessity of the case, and ceasing the instant resistance ceases. Wherever difficulty is apprehended in effecting an arrest, the bailiff may call any constable or peace officer to his assistance, as constables and peace officers within their respective jurisdictions will be

Sections bound to aid the bailiff to make an arrest. It would seem that where the bailiff uses proper precaution, and acts with reasonable firmness, he is not liable in case of a rescue being made. When an arrest is made, the party arrested should be at once brought to gaol, unless indeed he pay the amount mentioned in the warrant, with the costs; and there seems no objection to the bailiff taking it from him, although perhaps in strictness he would not be warranted in doing so. No more force or restraint should be imposed on the prisoner than is necessary to prevent his escape, and no delay should be made in placing the party in gaol. The warrant is left with the gaoler. The bailiff should obtain a memorandum from the gaoler of his having received the warrant and the party named therein from the hands of the bailiff. As in other cases, the bailiff must make return to the clerk of what he has done under the warrant:" 4 U. C. L. J. 83; see also notes to section 240. As to the indorsement on the warrant by the bailiff after arrest, see rule 103. Quære: Should a Judge, if in doubt as to the validity of a commitment on application to discharge the debtor, presume in favour of liberty and discharge him? See In re Beebe, 3 P. R. 270; R. v. Jordan, 36 W. R. 589.

> In Sandon v. Jervis, E. B. & E. 935, it was held that a sheriff's officer, under execution of a ca. sa., by putting his hand into a debtor's dwellinghouse by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor who was inside the house, and then said, "You are my prisoner,"—was an arrest.

> But if an officer opened a window (which was shut but not fastened) of a house for the purpose of making an arrest, it would seem that the arrest is unlawful: Nash v. Lucas, L. R. 2 Q. B. 590; Anglehart v. Rathier, 27 C. P. 97.

> A bailiff could be held responsible for not arresting: Burnham v. Hall-15 L. J. N. S. 204.

> If it had not been for D. C. Rule 101, there would not be a limit to the time within which a warrant of commitment could be executed: Hermitage v. Kilpin, L. R. 9 Ex. 205.

> We do not see that the bailiff could after arrest properly receive the debt and costs and discharge the debtor from custody: Arnott v. Bradly, 23 C. P. 1; Burnham v. Hall, 44 U. C. R. 297. See sections 216 and 244.

> For forms of Judge's orders of adjudication in cases under this section,

Constables, etc., to execute warrants.

243. All constables and other peace officers within their respective jurisdictions shall aid in the execution of every such warrant, and the gaoler or keeper of the gaol of the county in which the warrant has been issued, shall receive and keep the defendant therein until discharged under the provisions of this Act or otherwise by due course of law. R. S. O. 1877, c. 47, s. 185.

All Constables, etc., shall aid in the execution.—A refusal to "aid in the execution" of a warrant of commitment would be a misdemeanor: R. v. Sherlock, L. R. 1 C. C. 20; Criminal Code, 1892, 142.

See notes to section 52, and also notes to last preceding section.

By due course of law. -- If the gaoler should keep the debtor in prison longer than the law allows, according to the facts appearing on the face of the warrant, he would be liable: Moone v. Rose, L. R. 4 Q. B. 486;

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lebtor in prison ing on the face R. 4 Q. B. 486; and if the debtor should escape, the gaoler would also be liable: Alsept Sections v. Eyles, 2 H. Bl. 108, even though he escape through a relaxation of the prison rules on account of the debtor's ill health: Haines v. East India Co., 11 Moo. P. C. 39; or the insufficiency of the goal: Rowan v. McDonell, H. T. 3 Vic.: R. & J. 1624.

As to the damages in a case against any officer or gaoler for an escape : see MacRae v. Clarke, L. R. 1 C. P. 403; ante p. 28.

The imprisonment commences to run from the day on which the prisoner is actually lodged in gaol: Ex parte Foulkes, 15 M. & W. 612. A gaoler acting in obedience to a warrant valid on its face, is protected, if he does not detain the prisoner longer than the period mentioned therein, although he may have been in custody prior to the day of his delivery to the gaoler: Henderson v. Preston, 21 Q. B. D. 362.

244. Any person imprisoned under this Act, who has debtor satisfied the debt or demand, or any instalment thereof in custody payable, and the costs remaining due at the time of the discharged. order of imprisonment being made, together with the costs of obtaining the order, and all subsequent costs, shall, upon the certificate of such satisfaction, signed by the clerk of the court, or by leave of the Judge of the court in which the order of imprisonment was made, be discharged out of custody. R. S. O. 1877, c. 47, s. 186.

Shall be discharged. - The gaoler would have no power under this section, to receive the money and allow the defendant to go at large: Arnott v. Bradley, 23 C. P. 1.

The proper course to pursue would be to pay the amount to the clerk of the court from which the warrant issued, get a certificate from him of such satisfaction, upon which or by order of the Judge the defendant would be entitled to his discharge.

The gaoler would be bound to liberate the defendant on the certificate of the clerk or on an order of the Judge, either of which the gaoler should retain as his security. In the case of a discharge by the order of the Judge on the payment of the default, as remarked by Jervis, C.J., in the case of Ex parte Dakins, 16 C. B. at page 93, "When the money is paid, the Judge becomes a mere ministerial officer to order the discharge. He has no discretion. The prisoner is entitled to the order as a matter of

It is important to bear in mind that the order for commitment is not a process of contempt, but limited execution: Re Ryley. Ex parte Official Receiver, 15 Q. B. D. 329; Re McLeod v. Emigh, 12 P. R. 450.

245. The Judge before whom the summons is heard Judge may may, if he thinks fit, rescind or alter any order for payment and may previously made against a defendant so summoned before modify the him, and may make any further or other order, either for

Sections 245-247

the payment of the whole of the debt or damages recovered and costs forthwith, or by instalments, or in any other manner that he thinks reasonable and just. R. S. O. 1877, c. 47, s. 187.

May rescind or alter any order.—This section is substantially taken from the English Statute 9 & 10 V. c. 95, s. 100; see also 12 & 13 V. of England, c. 101, section 1. Power is here given to the Judge, on the hearing of a judgment summons, if he thinks fit, to mould the judgment of the court to suit the debtor's means and circumstances.

The words "previously made" used in this section, it is submitted, have reference to any order that may have been made under the 145th section, or on any previous judgment summons: see Davis, C. C. Acts,

When parties may be

246. In case the defendant in an action brought in a examined. Division Court has been personally served with the summons to appear, or personally appears at the trial, and judgment is given against him, the Judge, at the hearing of the cause or at an adjournment thereof, may examine the the defendant and the plaintiff and any other person touching the several things hereinbefore mentioned, and may commit the defendant to prison, and make an order in like manner as he might have done in case the plaintiff had obtained a summons for that purpose after judgment. R. S. O. 1877, c. 47, s. 188.

> Judge may examine Defendant, etc.—This is seldom resorted to. It can only be done where the defendant has been "personally served" with the summons, or "personally appears." Should a defendant have the means of payment of a debt, and the Judge were satisfied that he would leave the country before a judgment summons could be heard, he would probably act upon this section. The Judge, however, can under this section make any order he has authority to make on a judgment summons; see notes to section 235.

Debt not to

247. No imprisonment under this Act shall extinguish guished by the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execucion against the defendant. R. S. O. 1877, c. 47, s. 189.

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Any new fraud or other default.—At common law imprisonment on final process was generally considered a satisfaction of the plaintiff's debt. But it is not so under the provisions of this section: see Evans v. Wills, 1 C. P. D. 229.

Sections 247-249

The Judge can commit for as many defaults in payment as the facts warrant. There should be a fresh adjudication every time: In re Boyce, 2 E. & B. 521; see notes to section 240.

It is submitted that the reasoning of the case last cited, and especially of the judgments of Coleridge, Erle, and Crompton, JJ., at pages 528 and 529, is, that a fresh execution cannot be issued during the imprisonment of the debtor; see Ex parte Dakins, 16 C. B. pp. 93, 95. Sed quære.

248. [Every Division Court clerk shall make a return Annual return of to the Inspector of Division Courts on or before the 15th commitments of day of January in every year, shewing the number of judgment debtors who, during the twelve months ending the 31st December previously, were ordered to be committed under each of the five heads mentioned in section 240 of this Act.] 55 V. c. 11, s. 4.

Clerk shall make a return.—This section imposes upon the clerk the duty of making the return. Formerly the Judge had to make it. The section of c. 51 R. S. O., was repealed by 55 V. c. 11, s. 4, and the one here given substituted for it.

ABSCONDING DEBTORS.

- 249. In case a person, being indebted in a sum not abscondexceeding \$100, nor less than \$4, for any debt or damages ors. arising upon a contract, express or implied, or upon a judgment,
- 1. Abscords from this Province, leaving personal property liable to seizure under execution for debt in any county in Ontario;
- 2. Attempts to remove such personal property, either out of Ontario or from one county to another therein;
- 3. Keeps concealed in any county to avoid service of process and in case any creditor of such person, his servant or agent makes and produces an affidavit or affirmation to the purport of the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and in case the affidavit or affirmation be filed with

Section 249 the clerk of any Division Court in Ontario, then the clerk upon the application of the creditor, his servant or agent, shall issue a warrant under the hand and seal of the clerk, in the form prescribed by such General Rules and Orders, directed to the bailiff of the Division Court within whose division the same is issued, or to a constable of the county, commanding the bailiff or constable to attach, seize, take and safely keep all the personal estate and effects of the absconding, removing or concealed person within the county, liable to seizure under execution for debt, or a sufficient portion thereof to secure the sum mentioned in the warrant, with the costs of the action, and to return the warrant forthwith to the court out of which the same issued. R. S. O. 1887, c. 47, s. 190.

Absconding Debtors.—The proceeding under this and the following sections respecting absconding debtors is summary in its nature and exceptional in its character. The party taking it should, therefore, be held to a strict exercise of the rights conferred by the statute, and the due observance of all its requirements: Fletcher v. Calthrop, 6 Q. B. p. 891, per Denman, C. J.; Royal Can. Bank v. Matheson, 6 L. J. N. S. p. 11, per Galt, J.; Kraemer v. Gless, 10 C. P. p. 475; R. v. Ellis, 6 Q. B. 506.

Not exceeding \$100, nor less than \$4.—By section 70, sub-section 2, the increased jurisdiction conferred by paragraph (c) of that section, is extended to proceedings against absconding debtors under this and the subsequent sections of the Act. It will be observed that while this section may be invoked in cases arising within its provisions, for a sum not exceeding \$100 nor less than \$4 "for any debt or damages arising upon any contract, express or implied," section 70, sub-section 2 allows an attachment to issue only on claims, "the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant, or of the person whom as executor or administrator the defendant represents."

This distinction must be kept in view. The provisions of this section are not confined to liquidated damages but apply as well to claims of an unliquidated character, provided they arise in the manner pointed out by the statute. A claim in trespass or trover or for any other actionable wrong would not be within this section.

Proceedings could be taken on a judgment, no matter for what cause obtained. A claim for damages in any action when reduced to judgment, would become a "debt" under this clause: see Jones v. Thompson, E. B. & E. 63; Dresser v. Johns, 6 C. B. N. S. 429.

It is submitted that the word "judgment" here used should not be confined to the judgment of any particular Division Court, and that judgments of the High Court and County Courts would also be within its provisions; but judgments of any court but that out of which an atachment issued would, however, have to be sued for and recovered upon as any other debt of a like nature: Re Eberts v. Brooke, 11 P. R. 296.

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should not be and that judgbe within its hich an atachvered upon as P. R. 296. Who is an absconding debtor.—To abscond is to depart to defraud creditors or avoid service of process.

A debtor could "abscond" from this province to Quebec, or any other province of the Dominion, within this section.

One who might be in Ontario on a temporary sojourn could not be said to be absconding "from this province," on returning to his home: McPhadden v. Bacon, 9 L. J. N. S. 226; Clement v. Kirby, 7 P. R. 103, Rice v. Fletcher, 13 P. R. 46; see also Ex parte Gutierrez. In re Gutierrez, 11 Ch. D. 298; Butler v. Rosenfeldt, 8 P. R. 175; Scane v. Coffey, 15 P. R. 112. In the former case, it was held that in the case of a foreigner who was in England for a merely temporary purpose, and was preparing to return home, there was no presumption (as there might be in the case of a domiciled Englishman going abroad) that he was going away with the intention of avoiding the payment of a debt. The Master of the Rolls, at page 301, in speaking of an Act in some respects similar in its provisions to ours, says, "The Act is aimed at absconding debtors. A man who goes away does not necessarily abscond. * * I must say it appears to me that the process of the Court of Bankruptcy has been abused, by which I mean that it has been knowingly used for an improper purpose, contrary to the plain meaning of the Act and the justice of the case."

It was held in Smith v. Smith, 9 P. R. 511, that a defendant having contracted a debt in the United States, his ordinary place of abode, and in the act of returning there after a visit to his parents in this country, could not be arrested on a charge of leaving Ontario with intent to defraud his creditors. It is of no consequence where the domicile of a person may be or to what country he is bound by allegiance as a subject or citizen, if he come to this province and reside here and contract days and is about to quit the country (that is, in effect, about to change his residence to a foreign country, even if that country be his place of domicile) with intention to defraud his creditors, he is subject to arrest as an absconding debtor in this province: see also Lamond v. Eiffe, 3 Q. B. 910

A defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest to which he was subject in this province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest: Kersterman v. McLellan, 10 P. R. 122.

An intention to be temporarily absent on a trip to Europe does not justify an arrest, nor could it be said in such case that a man "abscords": Shaw v. McKenzie, 6 S. C. R. 181.

The person must "have personal property liable to seizure under execution" before he can be considered an "absconding debtor."

To "abscond" merely is not sufficient: Higgins v. Brady, 10 U. C. L. J. 268; Wakefield v. Bruce, 5 P. R. 77.

There cannot be a judgment against an absconding debtor where there has been no property attached, except upon proper service of the summons: per Draper, C.J., in Offay v. Offay, 26 U. C. R. p. 364; see also the notes to section 100 of this Act: Robertson v. Coulton, 9 P. R. 16.

Proceedings cannot be taken against an absconding debtor under the Absconding Debtors Act, until after the maturity of the debt: Kyle v. Barnes, 10 P. R. 20. It is submitted that the same principle is applicable to proceedings under this Act.

Personal property liable to seizure.—Formerly the general impression seems to have been that there was no exemption of any part of the goods of an absconding debtor: see R. v. Davidson, 21 U. C. R. 41. But see now R. S. O. c. 64, s. 4, and notes to section 212, ante p. 299 et seq.

D.C.A.-22

ection

Section 249 Attempts to remove.—The mere intention of removing personal property would not be sufficient. The attempt to remove or removal itself of any part of a debtor's personal property would justify an attachment under this section upon which all the personal estate and effects of the absconding debtor would be subject to seizure or such part as is necessary to secure the sum mentioned in the warrant: Sharp v. Matthews, 5. P. R. 10; Hood v. Cronkite, 29 U. C. R. 98; R. v. Collins, L. & C. 471; R. v. Johnson, 34 L. J. M. C. 24; Ex parte Coates. In re Skelton, 5 Ch. D. 979; 6 L. C. G. 17.

Keeps concealed.—This must in every case be a question of fact, and proper inquiries should be made before making the affidavit: see notes to sections 183 and 186. The inference must be that the concealment is for the purpose of avoiding the service of process. If the facts shew any other object or intention, the affidavit could not properly be made. A person might be said to be keeping concealed if he remained in his own house, and at his request his presence there was denied by his servants or others, or if being there, he, knowing the object of a process-server refused him admission.

"Concealment by a debtor to avoid the service of summons" was said to involve "an intention to delay or prevent creditors from enforcing their demands in the ordinary legal modes. It may be by the debtor's secreting himself upon his own premises, or by departing secretly to a more secure place, in or out of the county of his residence:" Dunn v. Salter, 1 Duv. 345; see also Frey v. Aultman, 30 Kansas, 182, 184.

Leaving a place, requesting that false information of the person's movements be given, is concealment: North v. McDonald, 1 Biss. 59.

In case any Creditor.—The word "creditor" must be read in connection with the words "for any debt or damages," etc., in the first part of the section, and cannot be confined to persons having liquidated demands merely.

His Servant or Agent.—The affidavit may be made by one who has express or implied authority to make it. The word "servant" cannot be held to apply to every servant, domestic or otherwise, but to one who, from the nature of his employment, would in this way have an express or implied authority to protect the interests of his master: see R. v. Cummings, 4 U. C. L. J. 182.

"An important branch of the duties of clerks is preparing affidavits for and suing out warrants of attachment. It is presumed that clerks will be applied to, except in cases of pressing emergency, where it may be indispensable to resort to justices of the peace; indeed, as a general rule, parties have no guarantee for the regularity of the proceeding unless they employ an officer instructed in and familiar with the requirements of law; and as magistrates seldom trouble themselves with such matters, and are not entitled to make any charge for drawing the affidavit and suing out the attachment, it is not probable their services will be sought, save where the defendant's property would be lost unless instant action was taken, and the clerk's office happens to be at a distance. The right to seize a party's property on the plaintiff's affidavit, or his agent's, unsupported by other testimony of the debt and state of facts giving right to attach, though a salutary provision of the law, is liable to abuse; and being an ex parte proceeding, the rules regulating the right must be strictly observed: '1 U. C. L. J. 21. For forms of affidavit and attachment, see Rule 35 and Forms 11 and 12. The statement of cause of action must be specially set out (Ib.), and for such statement in issuing attachment see 1 U. C. L. J. 21 and 41. Unless the affidavit clearly makes out a case under the increased jurisdiction provision of section 70, if the sum ring personal
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aring affidavits that clerks will ere it may be a general rule, ling unless they rements of law; natters, and are t and suing out ght, save where tion was taken, right to seize a unsupported by right to attach, e; and being an ust be strictly attachment, see f action must be attachment see akes out a case 70, if the sum claimed is in excess of \$100, the creditor and probably the clerk, if a seizure were made, could be held responsible as trespassers: Quackenbush v. Snider, 13 C. P. 196. Should the affidavit be "for money lent and goods sold and delivered," without shewing either that the money was lent, or that the goods were sold and delivered by the creditor to the debtor, it would be insufficient: Handley v. Franchi, L. R. 2 Ex. 34; McKenzie v. Bussell, 3 O. S. 343. The defendant could waive an irregularity in the affidavit, such as the omission to allege that the proceedings were not taken from any vexatious or malicious motive: Barrow v. Capreol, 2 U. C. L. J. 210. An affidavit for attachment which contains more than any one of the three alternatives of the statute is bad, and an attachment issued upon it would perhaps render all parties, except the bailiff, liable as trespassers: Quackenbush v. Snider, 13 C. P. 196; so also would they be liable if the warrant were issued without any affidavit: Caudle v. Seymour, 1 Q. B. 889; Gray v. McCarty, 22 U. C. R. 568. It would not render the affidavit bad, where made before suit commenced, to entitle it in the court: Hart v. Ruttan, 23 C. P. 613; Wakefield v. Bruce, 5 P. R. 77; see also Higgins v. Brady, 10 U. C. L. J. 268.

An attachment would be set aside if issued for money lent, the affidavit not stating by whom: McKenzie v. Bussell, 3 O. S. 343; see also Handley v. Franchi, L. R. 2 Ex. 34. In the absence of any form setting out the particular cause of action, as given in Form 11, the affidavit should follow as nearly as possible the common affidavit of debt for arrest: Anon, 2 O. S. 292. If the promissory note or other cause of action is fully set out, the indebtedness of the defendant would be alleged with sufficient certainty: Wakefield v. Bruce, 5 P. R. 77. The Judge has an inherent right to set aside an attachment improperly issued: Howland v. Rowe, 25 U. C. R. 467; Re Mitchell v. Scribner, 20 O. R. 17.

The necessity for the affidavit being duly made will more strongly appear by a reference to the cases of Morgan v. Hughes, 2 T. R. 225; Stevens v. Clark, 2 M. & Rob. 435; R. v. Hughes, 4 Q. B. D. 614; McLean v. Bradley, 2 S. C. R. 535; in addition to Caudle v. Seymour, and other cases supra. See also notes to section 86, ante p. 119.

A common error in regard to these affidavits is the omission to entitle them in the court or cause. There is only one case where an affidavit need not be so drawn in Division Court proceedings, and that is the case of a special summons, when the affidavit is endorsed on the summons (see Form No. 107) unless the Judge accepts the affidavit under Rule 138, which in proceedings against absconding debtors he should be slow to do.

Affidavit or affirmation to be filed.—In Moore v. Gidley, 32 U.C. R. 233, it was held, in an action against a justice of the peace for trespass in issuing a warrant of attachment, that the transmission of the affidavit to the D. C. clerk was not a necessary condition of his having jurisdiction. A written application to the clerk for an attachment is not necessary, as is required under Rule 7, for a judgment summons, nor does the creditor appear to be restricted to proceeding in any particular court as he is under section 81: see 1 L. C. G. 54.

Hand and seal of such clerk.—It will be observed that the warrant must be under the hand and seal of the clerk, and not under the seal of the court, as in section 212, in respect to executions: see Rule 9. Rule 35 and Form 12 appear to indicate that where the clerk issues the attachment it should be under the seal of the court. The statute and form being at variance, the former should govern: Boyle v. Ward, 11 U. C. R. 416. Probably the clerk could adopt the court seal as his own: Ontario Salt Company v. Merchants' Salt Company, 18 Gr. 551.

Form prescribed.—See Forms 11 and 12, and Rule 35, for forms of affidavit and attachment.

Section

Section 249

See also as to the form of such affidavit, Hagerty v. G. W. Ry. Co., 44 U. C. R. 319.

To a constable of the county.—Any constable of the county would have power to execute the warrant: Delaney v. Moore, 9 U. C. R. 294. If the bailiff cannot be found to execute the attachment and a constable is resorted to, care must be taken to see that he is a constable duly appointed: R. S. O. c. 82. Many people consider themselves constables when in law they are not. See section 258, sub-section 2.

Attach, seizure, take. - See notes to sections 212 and 228.

Liable to seizure under execution.—See also notes to section 212. In an action for seizing goods under Division Court attachment, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer. Held, that the plaintiff could not afterwards be permitted to set up that the sale was void because fraudulent as against the plaintiff's creditors, and to maintain trespass for seizing the same goods as if they were his own: McPhatter v. Leslie, 23 U. C. R. 578.

Should the bailiff or constable seize more than might reasonably be necessary "to secure the sum mentioned in the warrant, with the costs of the action" he (together with the sureties, in the case of the bailiff) would be liable for an excessive distress: see Piggott v. Birtles, 1 M. &. W. p. 449.

Return the warrant forthwith to the court.—The bailiff should make a written return to the warrant, to be filed with the papers. If nothing has been seized under the attachment, the plaintiff can only proceed as in an ordinary case: Offay v. Offay, 26 U. C. R. 364. Sometimes a judgment is attempted to be obtained by attachment in disregard of this rule.

Where there has been no proceeding by summons and the warrant issued by a justice of the peace, it is submitted that the warrant should be returned to the clerk of the court within whose division the affidavit was made or taken; see section 250; 1 L. C. G. 54.

If an attachment is maliciously issued and without probable cause, an action for damages for such wrong would lie at the suit of the debtor against the attaching creditor: Drake on Attachment, it hedition, sections 724-745; Pollock on Torts, 284, 235; Cartwright v. Hinds, 3 O. R. 384-395.

If there should be reasonable and probable cause for issuing an attachment, the action would not lie, no matter how maliciously issued. If a person has a right to do an act, and does it maliciously, yet it is not actionable: Shirley's Leading Cases, 3rd edition, 354.

Should an attaching creditor place the warrant of attachment for execution in the hands of some one unauthorized by statute—for instance, one who is not a duly appointed constable—he would simply be liable as a trespasser.

R. S. O. c. 66, s. 16, enacts as follows:-

WHEN DIVISION COURT ATTACHMENT SUPERSEDED.

16. If the sheriff to whom a writ of attachment is delivered for execution, finds any property or effects, or the proceeds of any property or effects which have been sold as perishable, belonging to the absconding debtor named in the writ of attachment, in the custody of a constable or of a bailiff or clerk of a Division Court by virtue of a warrant of attachment issued or money paid into court under a garnishee summons under

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s delivered for l any property the absconding a constable or rant of attachımmons under The Divisions Courts Act, the sheriff shall demand and take from the con- Section stable, bailiff or clerk, the property or effects, or the proceeds of any part thereof, and the constable, bailiff or clerk, on demand by the sheriff and notice of the writ of attachment, shall forthwith deliver all the property, effects and proceeds aforesaid to the sheriff, upon penalty of forfeiting double the value of the amount thereof, to be recovered by the sheriff, with costs of suit, and to be by him accounted for after deducting his own costs, as part of the property and effects of the absconding debtor; but the creditor who has duly sued out the warrant of attachment may proceed to judgment against the absconding debtor in the Division Court. and on obtaining judgment, and serving a memorandum of the amount thereof, and of the costs to be certified under the hand of the clerk of will Division Court, the creditor shall be entitled to satisfaction in like manner as, and in ratable proportion with, the other creditors of the absconding debtor who obtain judgment as hereinafter mentioned, R. S. O. 1877, c. 68, s. 16; 48 V. c. 15, s. 2.

See this section applied, Re Moore v. Wallace, 13 P. R. 201.

The Creditor's Relief Act, R. S. O. c. 65, s. 25, enacts:

25. (1) If the sheriff does not find sufficient property of a debtor leviable under executions and claims in his hands to pay the same in full, and the sheriff finds goods and chattels in the hands of the bailiff of a Division Court under a writ of execution or attachment against the debtor, the sheriff shall demand and obtain the goods and chattels from the bailiff, who shall forthwith deliver the same to the sheriff, with a copy of every writ of execution in his hands against the debtor, and a memorandum shewing the amount to be levied thereunder, including the bailiff's fees so far as proceedings have been taken by him, and shewing the date upon which each writ was received by him.

(2) In case the bailiff fails to deliver any of the goods, he shall pay double the value of the property retained, such double value to be recovered by the sheriff from the bailiff with costs of suit, and to be by the s. riff accounted for as part of the estate of the debtor.

(3) The sheriff shall distribute the proceeds among the creditors under the provisions of this Act, and the Division Court execution creditors shall be entitled, without further proof, to stand in the same position as execution creditors whose writs are in the sheriff's hands. 43 V. c. 10,

And by 52 V. c. 12, s. 7, it is enacted:

7. When the sheriff, under the provisions of the Creditor's Relief Act, takes possession of goods which are in the possession of a Division Court bailiff under a writ of attachment or execution, the costs and disbursements of the said bailiff shall be a first charge upon the goods, and shall be paid by the sheriff to the said bailiff upon demand, after being taxed by the Division Court clerk.

A writ of execution from the High Court or County Court, would, on the authority of Francis v. Brown, 11 U. C. R. 558, and under the Creditor's Relief Act entitle the sheriff to seize goods then in the possession of a Division Court bailiff under attachment; but it is submitted, after a careful perusal of the authorities here cited, and especially the judgment of Draper, C.J., at p. 565 of 11 U. C. R.; of Hagarty, J., in Fisher v. Sulley, 3 U. C. L. J. 89; of Draper, J., in Potter v. Carroll, 9 C. P. at p. 448, and looking at the object and scope of the Division Court's Act, that an execution from a Division Court, at the suit of another creditor, does not take priority of the attachment and authorize a seizure of such goods on the execution to the prejudice of the attaching creditor.

Sections 249-250 The principle of Francis v. Brown is, that the Legislature did not by the Division Court Act expressly take from an execution creditor in a Superior Court the rights against a debtor's goods which his writ gave him. No such reason, it is submitted, can be found for giving an execution priority over an attachment where both issue from the Division Court, and where neither one has precedence of the other. The goods are, it is to be observed, in the custody of the law, and cannot, it is submitted, during such time be again seized under Division Court process: King v. Macdonald, 15 C. P. 397; see Carroll v. Potter, 19 U. C. R. 346; Daniel v. Fitzell, 17 U. C. R. 369; Putnam v. Price, 1 L. C. G. 77; Paton v. Scram, 1 L. C. G. 93; 2 U. C. L. J. 172; 2 L. C. G. 49, 63; Nicol v. Ewin, 7 P. R. 331.

By the attachment the creditor obtains a lien on the goods seized to the extent of his claim, which the 254th section preserves to him until his execution issues, and then gives him, as against Division Court creditors, priority of execution: see Tate v. Corp. of Toronto, 3 P. R. 181; Caron v. Graham, 18 U. C. R. 315.

When Justice of the Peace may issue attachments, etc.

250. Any County Judge, or a Justice of the Peace for the County, may take the affidavit in the last preceding section mentioned, and upon the same being filed with the Judge or Justice, the Judge or Justice may issue a warrant under his hand and seal in the form prescribed as aforesaid, and the Judge or Justice shall forthwith transmit the affidavit to the elerk of the Division Court within whose division the same was made or taken, to be by him filed and kept among the papers in the cause. R. S. O. 1877, c. 47, s. 191.

Justice of the Peace for the County. - From the notes to the previous section will be seen the danger that justices of the peace run in issuing warrants of attachment; their safest course is to allow the clerk of the court to perform a duty which properly belongs to him. It is only in cases of necessity that a justice of the peace should grant the warrant. "Under the Division Courts Act, the creditor has a choice in cases of attachment to apply to any magistrate, or to the clerk of the court, to issue the warrant. The divisions are so small throughout the country, and the clerk's office is usually so near a creditor's residence, generally in the same or an adjoining township, that rarely is there any cogent necessity for applying to a magistrate rather than the clerk; and the saving of a few miles against the risk of error is rather heavy odds for a plaintiff to take. Applying to a clerk, he comes to an officer experienced in the work-one who has all the forms before him, and whose friendly word of caution will often save a plaintiff from getting himself into difficulty. It is not so when he applies to a magistrate, who is not and cannot be expected to be familiar with the Division Court The propriety, therefore, of employing the clerk seems obvious enough. Let no suitor be persuaded by a magistrate to come to him on such a business; and perhaps it may somewhat damp ardour in this particular if we mention the fact that a magistrate is not entitled to any fee under the statute for doing the work: " 9 U. C. L. J. page 318.

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"The simplicity so necessary to the working of Division Courts has, in Sections some cases, had the affect of allowing thoughtless or unscrupulous persons to work injuries, which are not so likely to occur in courts of higher jurisdiction. In the higher courts, to which we refer, the preliminary steps must come before the Judge; whereas in Division Courts many important measures are taken under the supervision of the clerks only, or even indeed before a justice of the peace. Of course, when process is issued by the clerks, there is a strong element of safety, and almost a certainty that the proceedings will be regular in form; but, in the case of justices no such security exists, as the records of the courts plainly show. Our attention has been called more especially to the issuing of writs of attachment, as well at the instance of thoughtless persons, who do not sufficiently consider the step they are about to take, as by unscrupulous creditors, who use the ready machinery of the court as an instrument to terrify those with whom they have to deal into submitting to such terms as they may think proper to impose. The Board of County Judges, in preparing their forms, have studied to provide that all the requisites of the statute should be complied with, and have made it necessary that the party seeking to have the writ issued should swear positively to the fact and nature of the indebtedness, and that the debtor has absconded, or has attempted to remove his property out of the province or county, or that the debtor keeps concealed with intent to defraud the creditor of his debt; and the creditor must also swear that he does not act from a vexatious or malicious motive. Now, if the requirements of the statute are carefully considered, and the affidavit carefully read over before swearing, much of the evil that has arisen

It is submitted that the filing by the justice is a necessary condition to the proper issue of the warrant: Magrath v Todd, 26 U. C. R. at p. 90; Lee v. Morrow, 25 U. C. R. 610; Westbrook v. Calaghan, 12 C. P. 616; R. v. Shaw, 23 U.C.R. 616; In re Meyers and Wannacott, 23 U.C.R. 611; R. v. Armytage, L. R. 7 Q. B. 773; James v. S. W. R. Co., L. R. 7 Ex. 287.

would be avoided; of course this would not deter persons who were so

disposed from wilfully using the writ as, we might almost say, an instru-

ment of torture: " 6 L. C. G. 17; see also 3 U. C. L. J. 61.

It was held however in Moore v. Gidley, 32 U. C. R. 233, that the omission by the justice of the peace to transmit the affidavit to the Division Court clerk did not render him liable as a trespasser, though the neglect to do so might render him liable for a beach of duty.

251. Upon receipt of the warrant by the bailiff or con-Bailiff or constable stable, and upon being paid his lawful fees, including the to seize fees of appraisement, the bailiff or constable shall forthwith inventory. execute the warrant, and make a true inventory of all the estate and effects which he seizes and takes by virtue thereof, and shall within twenty-four hours after seizure, call to his aid two freeholders, who being first sworn by him to appraise the personal estate and effects so seized, shall then appraise the same and forthwith return the inventory attached to the appraisement to the clerk of the court in which the warrant is made returnable. R. S. O. 1877, c 47, s. 192.

Sections 351-252 Including the fees of Appraisement.—The lawful fees of the bailiff, including fees of appraisement, shall be paid to the bailiff or constable before execution of the warrant. It is his option to exact them, but if he waives prepayment he would be bound to execute the warrant and be as responsible as if he had exacted prepayment of his fees.

See section 53 for fees of appraisers.

Forthwith execute the warrant.—Enquiry should be made by the bailiff as to the property intended to be seized, and, if perishable, it will be proper for him to require security under section 264; but generally, on receipt of a warrant directed to him, the bailiff is forthwith to execute the same; that is to say, he is to proceed with all diligence to seize such personal property of the debtor as may be taken under the ordinary writ of execution, or a sufficient portion thereof to secure the sum mentioned in the warrant, with costs. A difficulty may occur with respect to other creditors coming in afterwards, and it is not easy to lay down any rule as to the amount of property the bailiff should attach. If he has knowledge of any other creditors coming in, it would seem proper to seize enough to cover the claims of all; but in any case let the bailiff take ample property to cover, at a forced sale, the debt and costs in the case in which he acts. It may be that an enlarged meaning ought, in construction, to be given the word secure, as used in section 249; but we will not pursue the point at present, as it opens several nice questions. Having seized, the bailiff's first duty is to make an inventory of the property. For form of inventory see Form 120.

The inventory made, the bailiff within twenty-four hours thereafter, calls to his aid two freeholders, and swears them to appraise the property seized: 1 U. C. L. J. 22. This form of oath will be found at Form No. 121. A memorandum thereof should be then endorsed on the inventory

as follows:

On the day of A.D. 18., T. T. of and N. N. of were sworn by me well and truly to appraise the goods, chattels, property and effects mentioned in this inventory.

B. F.

Bailiff.

The freeholders then examine the property as pointed out to them by the bailiff, and, having valued the same, their appraisement should be endorsed on the inventory: 1 U. C. L. J. 22. The form of this endorsement will be found at Form 122. The appraisers must be sworn before they make the appraisement: Kenney v. May, 1 M. & Rob. 56. If the bailiff should sell without an appraisement, he would be liable to an action, but the sale would not be void: Lyon v. Weldon, 2 Bing. 334; Campbell v. Coulthard, 25 U. C. R. 621. The bailiff could not be an appraiser: Westwood v. Cowne, 1 Stark. 172; nor the attaching creditor: Andrews v. Russell, Bull. N. P. 81.

Gourt in which the warrant is made returnable.—This, it is submitted, means to the clerk of the court within whose division the affidavit for attachment was made or taken whether by himself or a justice of the peace: see section 250.

Proceedings may be continued in court out of which attachment issued.

252. In any case commenced by attachment, in a Division Court, the proceedings may be conducted to judgment and execution in the Division Court of the division within which the warrant of attachment issued. R. S. O. 1887, c. 47, s. 193.

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The Division within which the warrant of attachment issued --Reading this section in connection with section 250, it will be seen that 252-255 the Legislature presupposes the affidavit to be "made or taken," and the warrant of attachment to be issued within the same Division. Should the affidavit be taken in one division, and the warrant issued in another. there would be some inconvenience about the custody of the papers.

253. Where proceedings have been commenced in any Proceedings comcase before the issue of an attachment, the proceedings may menced before be continued to judgment and execution in the Division attachment to Court within which the proceedings were commenced. continue. R. S. O. 1877, c. 47, s. 194.

The proceedings by attachment is, in this case, supplementary to the action previously commenced.

254. The property seized upon a warrant of attach-Property ment shall be liable to seizure and sale under the execution may be under to be issued upon the judgment, or in case the property was execution. perishable, and has been sold, the proceeds thereof shall be applied in satisfaction of the judgment. R. S. O. 1877, c. 47, s. 195.

The property seized.—As to seizure and sale of chattels on execution, see notes to sections 212, 228, 229 and 251.

Replevin is not maintainable by the debtor against whom the attachment issues: R. S. O. c. 55, s. 3. But it is maintainable by a third party: Arnold v. Higgins, 11 U. C. R. 191; the action would, however, be stayed upon the issue of an interpleader summons under section 269: Caron v. Graham, 18 U. C. R. 315. See also notes to section 72, ante pp. 79-88.

Applied in satisfaction of the judgment.- This section provides for two cases; (1) If there is judgment in the case, the party in whose favor it is, may have the property seized and sold under execution. (2) If the goods are perishable, and have been sold, the proceeds of them shall be applied in satisfaction of the judgment.

As to sale of perishable goods, see sections, 264 and 265.

255. No plaintiff shall divide any cause of action into Plaintiff not to two or more actions for the purpose of bringing the same divide cause of within the provisions of the preceding sections, but a action. plaintiff having a cause of action above the value of \$100 and not exceeding \$200 for which an attachment might be issued if the same were not above the value of \$100 may abandon the excess, and upon proving his case, may recover to an amount not exceeding \$100 and the judgment of the court in such case shall be in full discharge of all demands

sections in respect of such cause of action, and the entry of judgment therein shall be made accordingly. R. S. O. 1877, c. 47. s. 196.

> No plaintiff shall divide any cause of action.—As to dividing any cause of action into two or more actions for the purpose of bringing the same in the Division Court, see section 77 and notes, ante pp. 102-106.

> The fact that there has been a splitting of demands must be taken advantage of by defence in the first action: Public School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310.

> May abandon the excess.—Where the excess is abandoned, it must be done in the first instance on the claim: Rule 8 and notes thereto: In re Higginbotham v. Moore, 21 U. C. R. 326; Re McKenzie v. Ryan, 6 P. R. 323. But there is nothing in this Rule to prevent the Division Court Judge from permitting the plaintiff to amend his claim before or at the trial, upon such terms as he thinks fit, and general Rule 118 and section 304 of this Act afford ample authority for permitting such amendment: but the Judge cannot be compelled by mandamus to exercise his discretion to permit amendment; In re White v. Galbraith, 12 P. R. 513.

> Upon proving his case.—It is submitted that if personal service of the summons, and of detailed particulars of the plaintiff's claim were made, the Judge might in his discretion give judgment without further proof: see sections 117, 261 and 262 and notes.

Other attaching creditors might defend the action under Rule 36.

If the defendant be not personally served, the trial could not take place until a month after the seizure under the attachment: Rule, 25.

No form is given for the minute of judgment, but it can be easily drawn up from the facts of the case.

If several attachments issued.

256. In case several attachments issue against any party then subject to the provisions contained in section 16 of The Act respecting Abscording Debtors, the proceeds of the goods and chattels attached shall not be paid over to the attaching creditor or creditors according to priority, but shall be ratably distributed among such of the creditors Rev. Stat. suing out such attachments as obtain judgment against c. 66, s. 10.; the debtor, in proportion to the amount really due upon such judgments; and no distribution shall take place until reasonable time, in the opinion of the Judge, has been allowed to the several creditors to proceed to judgment. R. S. O. 1877, c. 47, s. 197.

The Act respecting Absconding Debtors.—See R. S. O. c. 66, p. 757. Proceeds of goods, &c., not to be paid over according to priority.— See notes to section 249, ante page 342, and 7 U. C. L. J. 313.

When Division Court attachment superseded, see R. S. O. c. 65, s. 25, and R. S. O. c. 66, s. 16, ante pp. 340-342.

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Shall be ratably distributed .- Some difficulty has been experienced sections by clerks as to the proper method of distributing the proceeds of goods, and more especially where these are insufficient to pay the full claims of all attaching creditors, together with their costs. It is submitted that the proper method is for the clerk to make up the costs in each case, add the same to the debt and interest, and therefrom make an equal distribution of the proceeds. The method sometimes adopted of clerks deducting the total amount of costs from the total proceeds of the sale of the goods attached, and distributing the balance, is not correct. The costs which a plaintiff incurs stand in no higher position than his debt.

All necessary disbursements and expenses of the bailiff for keeping the attached goods form a first charge upon them and are deductable from the total proceeds before any pro rata distribution is made. See section 258.

The clerks, of course, should be paid their costs in such case as this section provides for, but each man's indebtedness to the clerk for costs, must be paid out of his pro rata share of the proceeds. The words "the amount really due upon such judgments" include costs as well as debt and interest.

Under section 257, if there is not sufficient to satisfy the claims of all the attaching creditors, only those would participate who sued out attachments and within one month after the issue of the first attachment, gave notice thereof to the clerk of the court out of which such first attachment issued or in which it was made returnable.

To proceed to judgment .- See notes to section 249, and Rules 35 and 36.

257. Where the goods and chattels are insufficient to If goods insuffisatisfy the claims of all the attaching creditors, no such cient. creditor shall be allowed to share unless he sued out his attachment, and within one month next after the issue of the first attachment, gave notice thereof to the clerk of the court out of which the first attachment issued, or in which it was made returnable. R. S. O. 1887, c. 47, s. 198.

Within one month next after. - A calendar month is here meant: see Interp. Act, s. 8, s.s. 15; and the day on which the first attachment issued would not be reckoned as part of the time: Hanns v. Johnston, 3 O. R. 100; notes to section 145. See Mactie v. Pearson, 8 O. R. 745.

Notice thereof to the clerk.—This notice is required now to be in writing; section 93. It is doubtful if depositing the notice in the post-office would be sufficient if it did not reach the clerk until after the month had expired. We think that if the post-office is used, it is at the risk of the party, and if the clerk does not receive the notice, it is not given.

258. (1) All the property seized under the provisions Qustody of of the previous sections, shall be, and remain in the custody seized and possession of the bailiff to whom the warrant of attachment is issued, and he shall take and keep the same until disposed of by law, and he shall be allowed all necessary disbursements and expenses for keeping the same.

Sections 258-259

(2) Where the property is seized under the provisions of the preceding sections by a county constable, it shall be forthwith handed over to the custody and possession of the bailiff of the court out of which the warrant of attachment issued, or into which it was made returnable; and such bailiff shall take the same into his charge and keeping, and shall be allowed all necessary disbursements for keeping the same. 49 V. c. 15, s. 14.

Shall remain in custody and possession of the bailiff.—Formerly the property seized was required to be handed over to the custody and possession of the clerk, but it is now to remain in the custody and possession of the bailiff to whom the warrant of attachment issued, who is to take and keep the same until disposed of by law.

If property is seized by a county constable it is to be fortuwith handed over to the bailiff as provided in sub-section 2; and if the bailiff did not seize the goods himself, but they were delivered to him by a county constable, neither trover, trespass nor replevin would lie against him: Caron v. Graham, 18 U. C. R. 318.

The bailiff would be bound to use ordinary care, diligence and prudence in keeping possession. He might insure the goods or the attaching creditor might do so. He would not, however, until in possession on an execution, be an insurer himself: Sinclair's Absconding Debtors, 73, 74; Ross v. Grange, 25 U. C. R. 396; Giblin v. McMullen, L. R. 2 P. C. 317.

Necessary disbursements.—The clerk should observe great care in this matter by seeing that the bailiff does not overcharge for keeping possession of the goods attached.

What are "necessary disbursements and expenses," must, of course, depend on the circumstances of the case, and must be determined by the clerk, subject to the revision of the Judge: section 46.

On what terms goods attached may be restored. 259. In case a person against whose estate or effects such attachment has issued, or any person on his behalf, at any time prior to the recovery of judgment in the cause, executes and tenders to the creditor who sued out the attachment, and files in the court to which the attachment has been returned, a bond with good and sufficient sureties, to be approved of by the Judge or Clerk, binding the obligors, jointly and severally, in double the amount claimed, with condition that the debtor (naming him) will, in the event of the claim being proved and judgment recovered thereon, as in other cases where proceedings have been commenced against the person, pay the same, or the value of the property so taken and seized, to the claimant or claimants, or produce the property whenever thereunto

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required, to satisfy the judgment, the clerk may supersede section the attachment, and the property attached shall then be restored. R. S. O. 1887, c. 47, s. 200.

A bond with good and sufficient sureties.—Except the attachment is set aside by order of the Judge, the only method by which the debtor can gain possession of his goods is by giving a bond under this section.

One surety would be sufficient: Interpretation Act, s. 8, s-s. 20.

If, however, the bond should be drawn naming two sureties, and but one executed it, the bond could not be received, for it would be a good defence to the surety who signed to shew that he believed, owing to the form of the bond, that it would be executed by the other: Hansard v. Lethbridge, 8 T. L. R. 346; and a plaintiff is entitled to a bond free from possible objections of that kind: Jones v. Macdonald, 14 P. R. 535. See also notes to section 35, ante pp. 26-31.

To be approved of by the Judge or Clerk.—Properly this should only be done after notice to the opposite party. The rights given to the creditor by attachment should not be taken away without an opportunity of his shewing cause against it, if so advised: notes to section 44, ante p. 86.

Value of the property so taken and seized.—The obligors would only be liable for the lesser sum, whichever it might be.

If an action had to be brought on the bond, the plaintiff could not reasonably claim more than the value of the goods as estimated by the appraisers. See notes to section 35.

No provision is made for re-delivery of the goods on payment of the amount claimed and costs. Such a course is frequently adopted when the possession of the goods is important to the debtor, or to a third party who may be owner thereof. It is submitted that the money so paid, is not paid voluntarily, but may be recovered back on shewing that the goods were improperly seized, either by reason of the attachment being improperly issued, or that that the goods were not the property of the debtor: DeCadaval v. Collins, 4 A. & E. 858; Pitt v. Coomes, 2. A. & E. 459; Clark v. Woods, 2 Ex. 395; Parker v. G. W. Ry. Co. 7 M. & G. 253; Close v. Phipps, 7 M. & G. 586; Valpy v. Manley, 1 C. B. 596; Green v. Duckett, 11 Q. B. D. 275; McKay v. Howard, 6 O. R. 135; Chandler v. Sanger, 114 Mass. 364; Cobb v. Charter, 32 Conn. 358.

When goods of a third party are lawfully seized for the debt of another, such third party is entitled to indemnity from the debtor, though there may be no agreement to indemnify, and though there may be in that sense no privity between the owner of the goods and the debtor: Edmunds v. Wallingtord, 14 Q. B. D. 811; see Herring v. Wilson, 4 O. R. 607, which, however, was founded on England v. Marsden, L. R. 1 C. P. 529, which is questioned in Edmunds v. Wallingford, supra.

If the third party should pay the money to the bailiff in order to obtain possession of the goods, the bailiff might interplead as to them; Smith v. Critchfield, 14 Q. B. D. 873.

A seizure by a landlord, of the goods attached, as a distress for rent, would be no answer to an action on the bond: Rapelje v. Finch, 14 U. C. R. 249. Nor would it be a performance of the condition, under such circumstances, to say to the obligee that he might go and take goods out of the possession of the landlord at his peril: s. c. 14 U. C. R. 468. Sections 260-262

If the debtor does not appear.

260. If within one month from the seizure as aforesaid, the party against whom the attachment issued, or some one on his behalf, does not appear and give such bond, execution may issue as soon as judgment has been obtained upon the claim or claims, and the property seized upon the attachment, or enough thereof to ratisfy the judgment and costs may be sold for the satisfaction thereof, according to law, or if the property has been previously sold as perishable under the provisions hereinafter made, enough of the proceeds thereof may be applied to satisfy the judgment and costs. R. S. O. 1877, c. 47, s. 201.

Within one month.—This would be exclusive of the day of the seizure : Young v. Higgon, 6 M. & W. p. 53; McCrae v. Waterloo M. F. Ins. Co., 26 C. P. 437; note to section 257, ante page 347.

As soon as judgment has been obtained.—This provision is probably made in order to save expense. It is submitted that the judge could not postpone the issuing of execution in such a case as this, and that sections 145 and 147 would not apply.

May be sold.—See notes so sections 232, 233 and 234.

As perishable.—See notes to section 263.

If summoned

261. Where the property of any person has been seized personally. under a warrant of attachment as aforesaid, and a summons has been personally served on such person before seizure then the trial of the cause shall be proceeded with as if no such warrant of attachment had been issued, and after judgment execution shall forthwith issue unless otherwise ordered by the Judge. R. S. O. 1887, c. 47, s. 202.

Has been seized-See notes to sections 212 and 228.

Personally served.—See notes to section 99, as to personal service. It is to be observed that this section only makes provision where service is made before seizure.

Execution shall forthwith issue unless otherwise ordered by the Judge.-Contrast the language of section 260 as to the issuing of execu-

Section 145, restraining the issue of execution for 15 days would not apply to a case under this section.

Proceedings against debtors where process not previously served.

262. Subject to the provisions contained in sections 14 and 16 of The Act respecting Abscording Debtors, in order to proceed in the recovery of any debt due by the person against whose property an attachment issues, where process has not been previously served, the same may be served

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n sections 14 ors, in order y the person here process y be served either personally or by leaving a copy at the last place of section abode, trade or dealing of the defendant, with any person there dwelling, or by leaving the same at the said dwelling, if no person be there found; and in every case, all subsequent proceedings shall be conducted according to the usual course of practice in the Division Courts; and if it Rev. Stat. appears to the satisfaction of the Judge on the trial, upon and 16. affidavit, or other sufficient proof, that the creditor who sued out an attachment had not reasonable or probable cause for taking the proceedings, the Judge shall order that no costs be allowed to the creditor or plaintiff, and no costs in such case shall be recovered in the cause. R. S. O. 1877, c. 47, s. 203.

Sections 14 and 16 of The Act respecting Absconding Debtors.—See R. S. O. c. 66, pp. 760, 761. Section 16 of The Act respecting Absconding Debtors will be found in the notes to section 249, ante p. 340.

The following is the other section of that Act which is here referred

PERISHABLE PROPERTY.

14. In case horses, cattle, sheep, pigs, or perishable goods or chattels, or such as from their nature (as timber or staves) cannot be safely kept or conveniently taken care of, are taken under a writ of attachment, the sheriff who attached the same shall have them appraised and valued, on oath, by two competent persons; and in case the plaintiff desires it and deposits with the sheriff a bond to the defendant executed by two freeholders (whose sufficiency shall be approved of by the sheriff), in double the amount of the appraised value of the articles, conditioned for the payment of the appraised value to the defendant, his executors or administrators, together with all costs and damages incurred by the seizure and sale thereof, in case judgment is not obtained by the plaintiff against the defendant, then the sheriff shall proceed to sell all or any of such enumerated articles at auction, to the highest bidder, giving not less than six days' notice of the sale, unless any of the articles are of such a nature as not to allow of that delay, in which case the sheriff may sell such articles last mentioned forthwith; and the sheriff shall hold the proceeds of the sale for the same purposes as he would hold property seized under the attachment. R. S. O. 1877, c. 68, s. 14.

Has not been personally served.—See notes to sections 99 and 109. At the last place of abode.—See notes to sections 81, 99, 109, and 235 as to service of process.

The usual course of practice.—See notes to section 261.

Reasonable and probable cause—If a man honestly believes in the case which he lays before a judicial tribunal, such belief being based on an honest conviction of the existence of circumstances which would lead any fairly cautious man to such belief, he has reasonable and probable cause for his action: Chatfield v. Comerford, 4 F. & F. 1008; Walker v. S. E. Ry. Co., L. R. 5 C. P. 640; Lister v. Perryman, L. R. 4 H. L. 521; Bank of B. N. A. v. Strong, 1 App. Cas. 307; Abrath v. N. E.

Sections 262-263

Ry. Co., 11 Q. B. D. 440; 11 App. Cas. 247: Broad v. Ham, 5 N. C. 725, per Tindal, C.J.; Shorsbery v. Osmaston, 37 L. J. N. S. 792; Hicks v. Faulkner, 8 Q. B. D. 167; Shaw v. Mckenzie, 6 S. C. R. 181; McGill v. Walton, 15 O. R. 389; Webber v. McLeod, 16 O. R. 609; Hope v. Evered, 17 Q. B. D. 338; Lea v. Charmington, 23 Q. B. D. 45, 272; Howard v. Clarke, 20 Q. B. D. 558; Hamilton v. Cousineau, 19 A. R. 293; Archibald v. McLaren, (to be reported in 22 S. C. R.).

The Judge shall order. - This is imperative on the Judge.

That no costs be allowed.—This is a penalty which the Judge may impose for the improper issue of an attachment. It would not effect the right of action against the attaching creditor for improperly issuing an attachment: Erickson v. Brand, 14 A. R. 614.

Power over the process of his own court is inherent in the Judge of a Division Court as well as of other courts; and notwithstanding the provisions of this section, a Judge may set aside an attachment which has been improperly issued: In re Mitchell v. Scribner, 20 O. R. 17.

Perishable

263. Subject to the provisions contained in sections 14 goods, how disposed of and 16 of The Act respecting Absconding Debtors, in case horses, cattle, sheep or other perishable goods have been taken upon an attachment, the bailiff of the court who has the custody or keeping thereof (the same having been first appraised, in the manner in section 251 of this Act mentioned), may at the request of the plaintiff who sued out the warrant of attachment, expose and sell the same at public auction, to the highest bidder, giving at least eight days' notice at the office of the bailiff of the said court, and at two other public places within his division, of the time and place of the sale, if the articles seized will admit of being so long kept, otherwise he may sell the same at his discretion. R. S. O. 1877, c. 47, s. 204; 49 V. c. 15, s. 15.

Rev. Stat. c. 66, ss. 14 and!16.

> The Act respecting absconding debtors. - See notes to section 262, ante p. 351, for section 14, and notes to section 249, ante p. 340, for section 16 of the Act respecting Absconding Debtors.

> Perishable goods.—It is submitted that the ejusdem generis principle is not applicable in a case of this kind, and that "perishable goods" should not be read as signifying property of the same kind or like description as those specifically mentioned in the words preceding them; but would include, lumber exposed to the weather, fruit, fish, vegetables or other chattel property of a perishable nature: Bank of Nova Scotia v. Ward, 21 N. S. Rep. 230; Cork and Bandon Ry. Co. v. Goode, 13 C. B. 836.

> Willes, J., said in Fenwick v. Schmalz, L. R. 3 C. P. at p. 315, in reference to the construction to be placed on a statute, "that if the particular words exhaust the whole genus, the general word must refer to some larger genus." See Stroud, 542-548; Sun Fire Office v. Hart, 14 App. Cas. 98.

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At the request of the plaintiff.—The request is a necessary condition of the sale, as remarked by Coleridge, J., in R. v. Ellis, 6 Q. B. 506, that, "the inflexible rule attaches, that under a special power parties must act strictly on the conditions under which it is given."

For his own protection the bailiff had better take the "request" in writing.

At least eight days .- This means "clear days," see note to sections 96 and 125, ante pp. 129 and 176; Rumohr v. Marx, 3 C. L. T. 31.

The goods must be exposed and sold at public auction and to the highest bidder. Any informality in the conduct of the sale would not invalidate it, though it might subject the bailiff to an action, if damages were sustained in consequence: Campbell v. Coulthard, 25 U.C. R. 621; see notes to section 233.

May sell the same at his discretion.—A discretion is here vested in the bailiff in regard to the sale of perishable property which cannot be safely kept for eight days, and if he did not exercise his discretion within the limits to which an honest man, competent to the discharge of his office, ought to confine himself, and damage ensued, he and his sureties would be responsible for it on their covenant: see 6 U. C. L. J. 250; Wilson v. Rastall, 4 T. R. 757.

Care should be taken that the notice of sale is duly given according to law: *ee notes to section 232.

264. It shall not be compulsory upon the bailiff or creditor to give constable to seize, or upon the bailiff to sell such perishable bond to indemnify goods, until the party who sued out the warrant of attach-the defendant. ment has given a bond to the defendant therein, with good and sufficient sureties in double the amount of the appraised value of the goods, conditioned that the party directing the seizure and sale will repay the value thereof, together with all costs and damages incurred in consequence of the seizure and sale, in case judgment be not obtained for the party who sued out such attachment, and the bond shall be filed with the papers in the cause. R. S. O. 1877, c. 47, s. 205; 49 V. c. 15, s. 15.

Has given a bond, &c. - If the officer neglects to obtain this bond, and proceeds to sell perishable goods, it will be at his own risk.

He would not be entitled to indemnity from the plaintiff unless the latter directed the sale: Barker v. Furlong, (1891), 2 Ch. 185; see 6 U. C. L. J. 250.

For form of bond, see Forms.

265. The moneys so made shall be by the bailiff paid Residue, how disover to the clerk, and the residue, if any, after satisfying posed of such judgments, with the costs thereupon, shall be delivered to the defendant or his agent, or to any person in whose custody the goods were found; and the responsibility of D.C.A.-23

Sections

Sections the clerk in respect of such property shall cease. 265-267 c. 15, s 16.

> Shall be delivered to the defendant or his agent.—The residue of the money, if any, after satisfying all judgments and costs, must be paid over as the section requires. If not so paid the person entitled could maintain an action therefor, or might take summary proceedings under section 277.

> Responsibility of the clerk .-- Is not the word "Clerk" intended to mean "bailiff"? The possession and responsibility for property seized under attachment is vested in the latter, and no responsibility whatever in respect of such property attaches to the clerk except such as might be incurred by the improper or illegal issue of process, and from which he is not released by this provision. Yet, according to the rules of judicial construction, the word "bailiff" cannot be here read for the word "clerk": see judgment of Denman, C.J., in Green v. Wood, 7 Q. B. 178; Morgan v. Thomas, 9 Q. B. D. 643, per Jessel, M.R.

Bond may be sued in deliver up bond.

266. A bond given in the course of any proceeding the Divis-ion Court. under this Act may be sued in any Division Court of the Judge may county wherein the same was executed, and proceedings may be thereupon carried on to judgment and execution in such court, notwithstanding the penalty contained in the bond may exceed the sum of \$100. R. S. O. 1877, c. 47, s. 207.

> May be sued in any Division Court.—In order to retain the Division Court as that in which certain proceedings relative to that court may be sued, it is here provided that a bond given in the course of any proceeding under the Act may be sued in any Division Court of the county wherein the same was executed. It matters not what the penalty of the bond may be—whether otherwise beyond the jurisdiction of the court or not-it is by this section made suable in that court. This would not deprive a party of the right to sue upon such bond in any higher court, except at the risk of losing and having to pay the costs of such court : Kennin v. Macdonald, 22 O. R. 484.

In an action on any such bond by the assignee of the bailiff, set-off could be pleaded, the penalty of the bond being considered as the debt: McKelvey v. McLean, 34 U. C. R. 635.

Since the existence of counter-claim, we see no reason why a defendant should not have the right to set the same up in such action.

See also notes to section 35.

267. Every such bond shall be delivered up to the party entitled to the same, by the order and at the discretion of the Judge of the court, to be enforced or cancelled, as the case may require. R. S. O. 1877, c. 47, s. 208.

Enforced or cancelled .- When a bond given in any Division Court proceeding has served its purpose, the Judge of the court may order the same to be delivered up, to be enforced, or cancelled, as the case may require.

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Division Court may order the the case may The right to the bond will depend upon the fact whether judgment has been given for or against the attaching creditor on the claim for which he attached; see condition of bond, in Form.

267-268

CLAIMS OF LANDLORDS AND OTHERS IN RESPECT TO GOODS SEIZED.

268. (1) In the next six sections, the word "landlord" Interpretation of shall include the person entitled to the immediate reversion the words of the land, or, if the property be held in joint tenancy, lord," coparcenary or tenancy in common, shall include any one of the persons entitled to the reversion; and

(2) The word "agent" shall mean any person usually "Agent." employed by the landlord in the letting of lands or in the collection of the rents thereof, or specially authorized to act in any particular matter by writing under the hand of the landlord. R. S. O. 1877, c. 47, s. 209.

Joint-tenancy, coparcenary or tenancy in common.—The person entitled to the "immediate reversion," would be any person entitled to the property immediately on the determination of the lease, as, for instance, a tenant who has sub-let would be the immediate reversioner: see Laird v. Briggs, W. N. (1880), 205.

"Joint-tenancy" is a unity of interest, title, time and possession, that is, joint-tenants have one and the same interest accruing by one and the same conveyance, commencing at the same time and held by one and the same undivided possession. One tenant cannot sue or be sued without joining the other; nor do any act to defeat or injure the other's estate; nor, at common law, have an action of waste or of account against his co-tenant.

Upon the death of one tenant the estate remains to the survivor. The estate is destroyed by severing any one of the unities, and then becomes a tenancy in common.

"Coparcenary" is where two or more persons together form one heir. They have distinct estates, with right to possession in common; and each may alien his share. It has practically no existence in this province, as since 1852, co-heirs take as tenants-in-common.

"Tenants in common," are such as hold by several and distinct titles, but by unity of possession; because none knows his own severalty, and therefore, all occupy promiscuously. One tenant may hold in fee-simple, the other in fee-tail or for life; or one may hold by descent, the other by purchase, or each by purchase from a different quarter; or the estate of one may have been vested for fifty years, and that of the other for a single day. The only unity is that of possession; because no man can certainly tell which part is his own. They take by distinct moities; no one has any entirety of interest; hence, there is no survivorship between them. As they differ from estates in severalty only in having the possession blended, the estate is dissolved by uniting all interests in one tenant, or by partition of the interests: Bl. Com. 191-194.

Section 269

Claims of landlords, etc., to seized in execution how to be adjusted.

c. 68.

When actions

matter

may be stayed.

269. (1) In case a claim be made to or in respect of any goods or chattels, property or security, taken in execution or attached under the process of a Division Court, or in respect of the proceeds or value thereof, by a landlord for rent, or by a person not being the party against whom the process issued, then, subject to the provisions of The Act respecting Abscording Debtors, the clerk of the court, upon application of the officer charged with the execution of the Rev. Suat. process, may, whether before or after the action has been brought against such officer, issue a summons calling before the court out of which the process issued, or before the court holden for the division in which the seizure under the respecting the subject process was made, as well the party who issued the process as the party making the claim, and thereupon any action which has been brought in the High Court or in a local or inferior Court in respect of the claim, shall be stayed.

Costs.

(2) The Court in which the action has been brought, or a Judge thereof, on proof of the issue of the summons, and that the goods and chattels or property or security were so taken in execution or upon attachment, may order the party bringing the action to pay the costs of all proceedings had upon the action after the issue of the summons out of the Division Court. R. S. O. 1877, c. 47, s. 210 (1, 2.)

County Judge to adjudicate on claims.

(3) The County Judge having jurisdiction in such Division Court shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him seems fit; and shall also adjudicate between the parties, or either of them, and the officer or bailiff in respect of any damage or claim of or to damages arising or capable of arising out of the execution of the process by the officer or bailiff, and make such order in respect thereof, and of the costs of any proceedings as to the Judge shall seem fit; and the order shall be enforced in like manner as an order made in an action brought in the Division Court, and shall be final and conclusive between the parties and as between them and the officer or

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n such Divimake such and of the nd shall also em, and the im of or to e execution e such order edings as to be enforced brought in nclusive behe officer or bailiff, except that upon the application of either the attach- section ing or execution creditor or the claimant, or the officer or bailiff, within fourteen days after the trial, the Judge may grant a new trial upon good grounds shewn, as in other cases under this Act, upon such terms as he thinks reasonable, and may in the meantime stay proceedings. 48 V. c. 14, s. 6.

(4) In case the bailiff has more than one execution or attachment at the suit or instance of different persons against the same property claimed as aforesaid, it shall not be necessary for the bailiff to make a separate application on each execution or attachment; but he may use the names of such execution or attaching creditors collectively in such application, and the summons may issue in the name of the creditors as plaintiffs. 49 V. c. 15, s. 17.

(5) Under the provisions of sub-section 3 the Judge Power to shall have power to adjudicate upon and award damages, damages. even though the amount of damages claimed, found or awarded should be beyond the jurisdiction of a Division Court.

(6) In respect of any damages claimed, or of any judgment, order or finding under the provisions of sub-sections 3 and 5 the parties and the bailiff applying, shall have the same rights of defence and counter-claim, including in all cases the right and liability to costs, as would exist had an action, within the jurisdiction of the Division Court, been brought to recover the said damages. 48 V. c. 14, s. 7.

In case a claim.—At one time the claim had to be of a legal nature: Sturgess v. Claude, 1 Dowl. 505; Hurst v. Sheldon, 13 C. B. N. S. 750; but that is not so now. The court will look at equitable as well as the legal rights of the claimant: Duncan v. Cashin, L. R. 10, C. P. 554; McIntosh v. McIntosh, 18 Gr. 58; Schroeder v. Hanrott, 28 L. T. N. S. 704; Connell v. Hickock, 15 A. R. 518. It is competent for the claimant to shew any facts warranting him to interfere with the process of execution. even if the property in the goods be in another; provided always the this will not work a surprise upon the execution creditor, and that the claimant appears to be in privity with or claiming under the real owner: Bryce v. Kinnee, 14 P. R. 509.

An action need not be commenced before taking interpleader proceedings: Green v. Brown, 3 Dowl. 337.

Section 269 The claim must be made by a third party. A claim of lien is within the statute: Ford v. Baynton, 1 Dowl. 357; Rogers v. Kennay, 9 Q. B. 592; or other special claim to the goods: Muckleston v. Smith, 17 C. P. 401.

So also if the goods are seized in the possession of a stranger: Allen v. Gibbon, 2 Dowl. 292. But if such stranger claims them, the onus of proving that they are exigible is upon the execution creditor: Gadsden v. Barrow, 9 Ex. 514; Duncan v. Tees, 11 P. R. 66, 296; Doran v. Toronto Suspender Co., 14 P. R. 103; Winfield v. Fowlie, 14 P. R. 102. But when the evidence shows that the stranger, though in possession, and though the execution debtor would be estopped from denying his title, has really no legal or equitable title to the goods, the execution creditor is entitled to succeed: Richards v. Jenkins, 18 Q. B. D. 451.

Under this Act, if the bailiff sells the goods without the claimant's consent, he cannot interplead for the proceeds: Reid v. McDonald, 26 C. P. 147; Darling v. Collatton, 10 P. R. 110.

The claimant might pay the amount of the execution, and the bailiff might then interplead as to the moneys: Paris Manufacturing Co. v. Walls, 10 P. R. 138; Smith v. Critchfield, 14 Q. B. D. 873.

Nor can the bailiff interplead where the goods are claimed by a third party after the bailiff withdraws from the seizure: Holton v. Guntrip, 3 M. & W. 145. Nor where the goods are under distress for rent, as they are then in the custody of the law, and the bailiff has no right to seize them: Haythorn v. Bush, 2 Dowl. 641.

If the bailiff were placed in circumstances which gave him an interest on either side, he could not interplead: Duddin v. Long, 3 Dowl. 139; 1 Bing. N. C. 299; Ostler v. Bower, 4 Dowl. 605, as where he has taken an indemnity from one party: Adams v. Blackwell, 10 P. R. 168; Thompson v. Wright, 13 Q. B. D. 632. Nor where he has brought about the claim: Cox v. Balne, 2 D. & L. 718. Nor where he has been guilty of neglect, and in consequence incurred a liability: Brackenbury v. Laurie, 3 Dowl. 180; Millar v. Nolan, 1 L. J. N. S. 327.

The Crown cannot be a claimant: McGee v. Baines, 3 U. C. L. J. 151; Candy v. Maugham, 6 M. & G. 710.

Where the goods have passed to an assignee in insolvency, see O'Callaghan v. Cowan, 41 U. C. R. 272.

The bailiff should apply as soon as possible: Cook v. Allen, 2 Dowl. 11.

If, having seized goods in execution which are claimed by another party, he delivers up part of the goods, the title to them being the same as the others, he, "in fact colludes with the party to whom he delivers them up," and disentitles himself to relief: Braine v. Hunt, 2 Dowl. 391.

The bailiff is not bound to accept an indemnity: Levy v. Champneys, 2 Dowl. 454.

But if he accept one he will not be relieved by interpleader: Ostler v. Bower, 4 Dowl. 605.

The bailiff is entitled to interpleader unless he has acted dishonestly, or his conduct has prejudiced either party: Holt v. Frost, 3 H. & N. 821.

In the case of an execution against one personally, he may as executor make claim to the goods, and such is the subject of interpleader: Fenwick v. Laycock, 2 Q. B. 163.

The interpleader summons must be taken out before money is paid over to the creditor, though the bailiff had notice before: Anderson v. Calloway, 1 C. & M. 182.

If the claimant has possession of the goods at the time of seizure, even though lent to him, that is sufficient to sustain his claim, and if the

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f seizure, even m, and if the creditor wishes to show a higher right in himself, he must displace that Section prima facie title which possession gives: Green v. Stevens, 2 H. & N. 146; Shingler v. Holt, 7 H. & N. 65; Porter v. Flintoff, 6 C. P. 337: Mason v. Morgan, 24 U. C. R. 328.

Execution creditors in the Division Court should be made parties to interpleader proceedings in the High Court: Macfie v. Hunter, 9 P. R.

A married woman may sustain a claim on interpleader: Shingler v. Holt, 7 H. & N. 65; R. S. O. c. 132, ss. 3 and 14.

Interpleader proceedings apply to foreigners residing abroad: Attenborough v. London & St. Katharines Dock Co., 3 C. P. D. 450; Belmont v. Aynard, 4 C. P. D. 221, 352; The Credits Gerundeuse (Limited) v. Van Weede, 12 Q. B. D. 171.

Growing crops are the subject of seizure and sale, and, consequently, can be the subject of an interpleader issue in the Division Court: Ingram v. Taylor, 7 A. R. 216; Grass v. Austin, 7 A. R. 511; Hamilton v. Harrison, 46 U. C. R. 127; Haydon v. Crawford, 3 O. S. 583; Campbell v. Cushman, 4 U. C. R. 9; Hamilton Provident & Loan Co. v. Campbell, 5 O. R. 371.

A claim to goods under the revenue laws could not be sustained: Dame v. Carberry, 10 U. C. R. 374.

It frequently becomes a question with a bailiff whether he is bound to interplead unless the amount is prepaid or security is given to him for the costs which he must necessarily incur by interpleading. No provision has apparently been made for such a case. We think if he desires to protect himself he should interplead under any circumstances.

An action of trespass may be brought pending an interpleader issue: per Denman, C.J., Hooke v. Ind. Coope & Co., 36 L. T. N. S. 467. But under the provisions of this section it would be immediately stayed on the issue of the interpleader summons: see sub-section 1; Smith v. Critchfield, 14 Q. B. D. 873.

Where more goods are seized than claimed, the claimant must in his particulars of claims, specify the particular goods which he claims: Price v. Plummer, 26 W. R. 45; Plummer v. Price, 39 L. T. N. S. 657.

Where on a claim being made to goods seized by a bailiff the execution creditor does not direct the bailiff to give up the goods to the claimant, but appears and contests his title in interpleader proceedings, it was held no evidence of a ratification by the execution creditor of the bailiff's detention: Toppin v. Buckerfield, 1 C. & E. 157.

Should the bailiff, with the consent of the execution creditor and the claimant, temporarily withdraw from possession of the goods or chattels, they would no longer be under seizure, and a landlord could distrain upon them for rent, although he knew that the interpleader proceedings were pending: Cropper v. Warner, 1 C. & E. 152; see Craig v. Craig, 7 P. R. 209.

A Division Court bailiff, under our law has no alternative but to keep possession of the goods or chattels seized, and should he take a bond from the debtor and allow him to remain in possession of the goods, or otherwise abandon the possession, the rights of other creditors or of a landlord would prevail: Roe v. Roper, 23 C. P. 76; Williams v. Grey, 23 C. P. 561; Blades v. Arundale, 1 M. & S. 711; Darby v. Waterlow, L. R. 3 C. P. 453, and cases cited supra.

Should the execution creditor be prejudiced by the bailiff's abandoning the seizure, the latter would be liable: Maclean v. Anthony, 6 O. R. 330; and the goods would, in case of doubt, be presumed to be sufficient to satisfy the execution: Donnelly v. Hall, 7 O. R. 581.

The officer of a Division Court is not required to retire from possession of goods that he has seized, because an interpleader summons has been issued: Ex parte Summers, 18 Jur. 522.

Taken in Execution or Attached.—Goods must be "taken in execution or attached," that is, they must be seized before a bailiff can interplead: Goslin v. Tune, 2 U. C. R. 177; Ogden v. Craig, 10 P. R. 378.

Proceeds or value thereof.—This is analogous to money in the sheriff's hands about which interpleader can be had: Scott v. Lewis, 2 C. M. & R. 289; Hall v. Kissock, 11 U. C. R. 9; Booth v. Preston & Berlin Ry. Co., 6 U. C. L. J. 57.

But under this section there can only be an interpleader "in respect of the proceeds or value," where a claim is made to the same; and should the claim be made to the goods, there could be no interpleader as to the proceeds: Reid v. McDonald, 26 C. P. 299; see also McArthur v. Cool, 19 U. C. R. 476; Watson v. Henderson, 6 P. R. 299; unless sold by consent of the claimant: Darling v. Collatton, 10 P. R. 110.

By a landlord for rent.—Should the bailiff, for instance, have reason to believe that a landlord's claim for rent was merely fictitious, or that no rent was due, or in any such case, then it would be his duty to interplead. The party claiming must virtually be a third party: Fenwick v. Laycock, 2 Q. B. 108; 3 U. C. L. J. 197-214; 4 U. C. L. J. 12-38.

Upon the application of the officer.—"The clerk ought not, without the application of the bailiff to have issued the summons:" per Draper, J., R. v. Doty, 13 U. C. R. p. 400; but if both parties appear the objection would be waived: Ib.

"Every bailiff deeming it necessary to seek the protection of an interpleader should act promptly in the issuing of a summons. He may proceed either in the court from which execution issued, or the court for the division in which he makes the seizure when it happens that the seizure is made in another division. The application to the clerk should be in writing, and care should be taken to obtain the correct name and address of the claimant. The goods claimed should also be specified, and the reasonable value set down to guide the clerk in rating the fees, and for the information of the court. The date of the seizure should also be named. The following, or a form to the like effect, would answer:

Bailiff's application for Interpleader Summons.

In the Division Court, County of

and

Between A. B.,

Plaintiff,

By virtue of a writ of execution (or "attachment") in this cause, dated the day of ,18 , from this court, I did on the day of ,18 , seize and take in execution (specify goods, chattels, &c., claimed as the property of the defendant, the following goods and chattels, viz., one horse and, &c., the whole about the value of dollars. E. F. of the township of &c., now claims the same as his property. You will therefore be pleased to issue an interpleader summons to the plaintiff and to the said E. F. according to the statute in that behalf.

To clerk of the Division Court, County Dated, &c.: 4 U. C. L. J. 38. Bailiff."

The issue of the interpleader summons does not remove the case from the control of the court: Wicks v. Wood, 26 W. R. 680.

Issue a summons.—The issue in such a case is, whether the goods taken under the attachment were at the time of the seizure the property of the claimant, as against the creditor: Doyle v. Lasher, 16 C. P. 263;

Van Every v. Ross, 11 C. P. 133; Culloden v. McDowell, 17 U. C. R. 859; Section McDowell v. McDowell, 10 U. C. L. J. 48; Watts v. Howell, 21 U. C. R. p. 259; Merchant's Bank v. Herson, 19 L. J. N. S. 353; 10 P. R. 117. But it is immaterial who is the plaintiff, the object of the proceeding being to inform the conscience of the court whether the creditor has a right to seize the goods: Muckleston v. Smith, 17 C. P. 405; Edwards v. English, 7 E. & B. 564; Bryce v. Kinnee, 14 P. R. 509.

The execution creditor is not liable for the seizure: Walker v. Olding, 1 H. & C. 621; Tinkler v. Hilder, 4 Ex. 187: unless directed by him or his agent: Wilkinson v. Harvey, 15 O. R. 346.

In Slaght v. West, 25 U. C. R. 391, it was held that a solicitor had implied authority to direct a seizure, but the contrary was held in Smith v. Keal, 9 Q. B. D. 340; and a solicitor retained to collect a debt is not entitled te interplead without a further retainer for that purpose: Hackett v. Bible, 12 P. R. 482.

Before the Court holden for the Division.—Should a bailiff be called on to enforce an execution from another Division Court in the same county, and a claim made to the goods, he could issue summons from his own court; and the same rule would apply if a bailiff went out of his own division to make a seizure. The claim must be adjudicated upon in the court from which the execution issued, or in which the seizure was made: Washington v. Webb, 16 U. C. R. 232.

Any action brought, etc., shall be stayed.—When interpleaper process is issued, the effect is to arrest all proceedings in any action that may have been commenced against the bailiff connected with the claim.

The regularity of the proceedings in the Division Court will not be inquired into on an application to stay proceedings: Finlayson v. Howard, 1 P. R. 221. An action of replevin for the same goods about which an interpleader issue was tried will be stayed: Caron v. Graham, 18 U. C. R. The application to stay proceedings can only be made before the adjudication on the interpleader summons; if made after, application will be refused, and the defendant can only plead the adjudication: Schamehorn v. Traske, 30 U. C. R. 543; see Harmer v. Cowan, 23 U. C. R. 479.

Under the power to stay proceedings the court or Judge has power to stay the action against the execution creditor as well as the officer: Carpenter v. Pearce, 27 L. J. Ex. 143, and the words of the statute here are imperative.

The Judge cannot reverse, change or alter his decision, if the application for new trial is made after the time has elapsed: Re Foley v. Moran, 11 P. R. 316; Bland v. Rivers, 19 O. R. 407.

Judge to make order.—When the Judge has formally declared his decision, and when the same is embodied in an order, it then becomes evidence of the adjudication mentioned in the statute.

The costs of the proceedings.—The Judge could not adjudicate upon any question of costs, except costs of the proceedings mentioned in the statute: Hansen v. Maddox, 12 Q. B. D. 100.

It will be observed that the subject of costs in mentioned twice in this sub-section: 1st, in regard to the costs of the interpleader proceedings to test the right to the goods seized, and 2nd, in respect to the costs of the proceedings incident to the enquiry as to damages. As to the question of costs between the parties to the interpleader issue it may be said that costs should usually follow the result. It is a rule generally observed and subject to few exceptions, if any:
528; Scales v. Sargeson, 3 Dowl. 707; Wills v. Hopkins, 3 Dowl. 846; Bank of Montreal v. Little, 17 Gr. 685.

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When each party succeeds as to part, the costs will be apportioned: Lewis v. Holding, 3 Scott. N. R. 191; Staley v. Redwell, 15 Å. & E. 145; Clifton v. Davis, 6 E. & B. 392; Dempsey v. Caspar, 1 P. R. 134; Carter v. Stewart, 7 P. R. 85; Segsworth v. Meridan S. Plating Co., 3 O. R. 413.

Should either the execution creditor or the claimant, after the issue of the interpleader summons, wish to abandon all claim to the goods, it is not definitely established what the effect of doing so would be on the question of costs,

If an execution creditor had not given any instructions as to the seizure of the goods, and on being made aware of it had given notice abandoning all claim to them, it is submitted that he could not be held responsible for costs: Wilkins v. Peatman, 7 P. R. 84; Canadian Bank of Commerce v. Tasker, 8 P. R. 351; Rood v. Gun and Shot and Griffin's Wharves Co., 28 L. T. N. S. 635; istaden v. Vanstaden, 10 P. R. 428.

The question of costs cannot be considered wonder the disposal of the issue: Salter v. McLeod, 10 U. C. L. J. 299.

Should there manifestly appear to be no bona fide claim to the goods by a claimant, he could not, it is submitted, obtain security for costs from the other party: Doer v. Rand, 10 P. R. 165; De St. Martin v. Davis, W. N. (1884), 86; Anglo-American v. Rowlin, 20 L. J. N. S. 371: Tomlinson v. Land and Finance Corporation, 14 Q. B. D. 539.

As security for costs can now be ordered in the Division Court: Re Fletcher v. Noble, 9 P. R. 255, the writer sees no reason why such security cannot be ordered in an interpleader issue: Lovell v. Wardroper, 4 P. R. 265; Swain v. Stoddart, 12 P. R. 490.

Where the claimant fails the bailiff's costs are to be allowed to him out of the amount levied unless otherwise ordered.

If the bailiff does not retain his costs out of the amount levied, he cannot, if the claimant has been ordered to pay the costs sue the execution creditor for them: Bloor v. Huston, 15 C. B. 266,

The High Court would have no power to interfere with the discretion exercised by the Judge of the Division Court on a question of costs: Churchward v. Coleman, L. R. 2 Q. B. 18.

Independently of the Judge's order there would be no duty cast on either execution creditor or claimant to pay the costs of the interpleader proceedings: Bloor v. Huston, 15 C. B. p. 275.

Where judgment had been given in an interpleader issue, and the Court of Appeal reversed it, it was held that that part relating to costs was reversed too: Gage v. Collins, L. R. 2 C. P. 381.

The County Judge having jurisdiction.—Should the summons not properly be issuable from the court from which it was issued, the Judge would have no jurisdiction: see notes to sections 21, 69 and 70; but see Haldan v. Beatty, 43 U. C. R. 614.

Shall adjudicate upon the claim.—The language is imperative, and the Judge has no alternative but to adjudicate on the questions which are properly presented to him in the interpleader issue. The adjudication here mentioned is simply the judicial determination of some question or questions in dispute between the parties to the interpleader issue.

As to the right of a party to an interpleader issue to demand a jury, and the issues to be tried in such a case, see section 155 and notes thereto.

Unless a new trial is moved for as prescribed by this sub-section, the decision of the Judge is final and conclusive as to the goods or the proceeds thereof: R. v. Doty, 13 U. C. R. 398; Keane v. Stedman, 10 C. P.

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Damages, etc., arising out of the execution of the process. - This provision is taken from the English statute, 30 & 31 V. c. 12, s. 31 (see now, The County Court, 1888, 51 & 52 V. c. 43, s. 157). The material words are exactly alike in both statutes, changes being made in our statute to suit the altered circumstances.

The Judge has power, and it is his imperative duty, not only to adjudicate between the parties to the issue or either of them, but also as between either of them and the officer or bailiff in respect of any damage, or claim of or to damages arising or capable of arising out of the execution of the process by the officer or bailiff.

The words of the section are very comprehensive, and are intended to cover, and it is submitted do cover all and every claim for damages which any of the parties would have had against the other in any way arising, or that by possibility might arise out of the execution of the

It is submitted that a liberal interpretation should be given to the clause and that it would be applicable to the case of a seizure made under warrant of attachment issued by a County Judge or justice of the peace under section 250, if damages ensue. Should any of the parties have any claim for damages, within the meaning of this provision, it should be asserted in the interpleader issue, and if the party having such claim should lie idly by and allow the Judge to adjudicate upon the other questions only, he would be precluded from making the claim in another action: Death v. Harrison, L. R. 6 Ex. 15: Fox v. Symington, 13 A. R. 296. The section was enacted following the English statute after the decision of Farrow v. Tobin, 10 A. R. 69, which probably suggested

But an action might still be maintained against the purchasers of the goods: Hills v. Renny, 5 Ex. D. 313.

The English Act contains a provision for staying proceedings in any action between any of the parties, "in respect of such claims or of any damage arising out of the execution of such process." The language is somewhat wider than that of sub-section 1, but quære, whether it has any greater effect: Smith v. Critchfield, 14 Q. B. D. 873.

What damages may be given must of course depend on the circumstances of each particular case. But it is submitted, that the object of allowing the bailiff to interplead is that he may be protected against the adverse claims of the execution creditor and the claimant, and so that they may fight out the question of the ownership of the goods between themselves.

The bailiff stands in this position. If he does not seize, the execution creditor may sue him and his sureties for misconduct. If he seizes, the claimant may sue him for trespass and conversion. It would, in fact, be no protection to the bailiff to mulct him in damages, if acting honestly in the execution of his duty he seized goods which in fact belonged to the claimant. The principles of interpleader and the principles of practice of the High Court may well be followed in a case of this kind.

In Smith v. Critchfield, 14 Q. B. D. 873, at page 878, Brett, M.R., said :-- "It is not of course in every case that the Judge will protect the sheriff. He will be protected when he has only made an honest mistake in executing the powers of the court, and but for such mistake everything that has been done would have been justified by the writ."

Within fourteen days .- See notes to sections 145 and 146, as to application for new trial. At one time there was no power to grant a

new trial in cases of interpleader in the Division Court: R. v. Doty, 13 U. C. R. 398; and unless a new trial is moved for within the proper time now, the Judge's decision is irrevocable in such cases: Re Foley v. Moran, 11 P. R. 316; Bland v. Rivers, 19 O. R. 407.

Any one of the three parties may apply for a new trial: (1) The attaching or execution creditor; (2) The claimant; (3) The officer or bailiff.

Upon such terms as he may think reasonable.—The usual power to impose terms on granting a new trial is here conferred on the Judge. This is a discretion which should not be exercised arbitrarily, but according to the principles of reason and justice, and with a due regard to the rules of law applicable to such cases: see notes to section 175.

As to the imposition of terms see notes to section 109, ante page 149.

Sub-section 4.—Summons may issue in the names of the creditors as plaintiffs.—The application by the bailiff for an interpleader summons and the summons to be issued by the clerk in pursuance of it, must give the names of all the execution or attaching creditors as in the suits, and all must be duly served in order to bind them. Should a bailiff disregard this section he, as an officer, would be subject to the summary jurisdiction of the court, and would be made to bear the unnecessary expense, and the cases too would be consolidated: Merchant's Bank v. Herson, 10 P. R. 117.

In interpleader proceedings, in the High Court of Justice or County Courts, the sheriff must, where there are Division Court execution creditors, bring them in on the application: Macfie v. Hunter, 9 P. R. 149; C. R. 1156, 1161, 1162.

The issue of the interpleader summons assumes the right of the execution creditor to seize the goods of the execution debtor by virtue of a udgment recovered or attachment issued against him, and subsequently the execution creditor is not bound to prove a judgment: Holden v. Langley, 11 C. P. 407; Vindin v. Wallis, 24 U. C. R. 9; Doyle v. Lasher, 16 C. P. 263; McWhirter v. Learmouth, 18 C. P. 136.

Quære, whether a subsequent execution creditor could contest the right of a prior execution creditor to the goods or their proceeds on the ground that his judgment was void as against creditors?

The judge has full power to try the question of damages, no matter to what amount such damages may be.

As to the right of appeal in interpleader cases, see section 148, s-s. (2) and notes thereto.

It is submitted that the doubt whether an appeal lies from the determination of the judge, on a question of damages in such cases, by Fox v. Symington, 13 A. R. 296, at page 302, has been removed on the revision of the statutes by section 148, s.s. (2). The better opinion seems to be that an appeal will lie at the instance of a landlord who has been a party to the interpleader proceedings: Wilcoxon v. Searby, 29 L. J. Ex. 154.

Where neither the value of the goods claimed nor the proceeds thereof exceed \$100, an appeal does not lie, even by leave of the Judge: Collis v. Lewis, 20 Q. B. D. 202; see also, White v. Milne, W. N. (1887), 256.

Sub-section 6—Defence and Counterclaim.—See section 75 and 76 and notes thereto. The right is apparently given to the bailiff to counter-claim in case it is sought to recover damages against him. This is practically allowing him to sue in his own court, notwithstanding section 88.

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270. So much of the Act passed in the eighth year of Section the reign of Queen Anne, intituled An Act for the better $\frac{1}{\text{Provisions}}$ security of Rents and to prevent Frauds committed by in relation to rents Tenants, as relates to the liability of goods taken by virtue due to landlords of any execution, shall not be deemed to apply to goods taken in execution under the process of any Division Court, but the landlord of a tenement in which any such goods are so taken may, by writing under his hand or under the hand of his agent, stating the terms of holding and the rent payable for the same, and delivered to the bailiff making the levy, claim any rent in arrear then due to him, not exceeding the rent of four weeks when the tenement has been let by the week, and not exceeding the c. 14. rent accruing due in two terms of payment where the tenement has been let for any other term less than a year, and not exceeding in any case the rent accruing due in one year. R. S. O. 1877, c. 47, s. 211.

Goods taken by virtue of any execution. - The statute of Anne prevented the sheriff from removing "goods seized" under execution, without paying the rent of the premises in arrear, "not exceeding the rent for one year."

The County Courts Act, 1888, (51 and 52 V. c. 43, s. 160) contains provisions very similar to those made by this and following sections.

It is submitted that goods seized under an attachment against an absconding debtor are not, under this section, subject to the landlord's claim for rent.

The section would apply to an execution for costs of defence: Henchett v. Kimpson, 2 Wils. 140.

Landlord's claim for rent-The landlord of a tenement. - "Tenement," though in its vulgar acceptation is only applied to houses and other buildings, yet, in its original, proper and legal term signifies everything that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind:" 2 Bl. Com. 16; Stroud, 974.

The notice cannot be given unless there is an existing tenancy at a fixed rent; and if the tenancy should be determined or has expired the notice could not be given: Cook v. Cook, Andrew, 219; Riseley v. Ryle, 10 M. & W. 101; and Riseley v. Ryle, 11 M. & W. 16. A mere agreement for a lease under which no rent has been paid would not be sufficient: Ib.; see Hand v. Hall, 2 Ex. D. 355. Nor does the statute apply if the lease has been legally determined by a notice to quit or by entry or ejectment for a forfeiture: Hodgson v. Gascoigne, 5 B. & Ald. 88. It applies to forehand rents payable in advance: Harrison v. Barry, 7 Price, 690; Duck v. Braddyll, McClel. 217; and even when reserved in a mortgage by way of further security for interest: Yates v. Rutledge, 5 H. & N. 249; Trust & Loan Co. v. Lawrason, 10 S. C. R. 679; Ontario Loan & Debenture Co. v. Hobbs, 16 A. R.

255; 18 S. C. R. 483. The statute would apply to cases of lessee and undertenant of apartments: Thurgood v. Richardson, 7 Bing. 428. The landlord can only claim rent which was due at the time of the seizure, and not what accrued afterwards: Hoskins v. Knight, 1 M. & S. 245; Reynolds v. Barford, 7 M. & G. 449; Tomlinson v. Jarvis, 11 U. C. R. 60; Vance v. Ruttan, 12 U. C. R. 632. And this is also the law as to growing crops: Congreeve v. Evetts, 10 Ex. 298; Wharton v. Naylor, 12 Q. B. 673. It is to be observed that the words of the section are "any rent in arrear then due." The Statute of Anne was construed liberally, and in favour of the landland: Henchett v. Kimpson, 2 Wils. 141. We see no reason for construing this section in any different spirit. This provision would not apply to a case where the landlord was himself the execution creditor: Taylor v. Lanyon, 6 Bing. 536. Where the execution creditor pays the landlord the rent after seizure, the bailiff holds the proceeds of sale for the repayment to the creditor of the rent paid and the amount of the execution: Lockhart v. Gray, 2 L. J. N. S. 163. Under the Statute of Anne it is not necessary to give notice "in writing" to the sheriff: Brown v. Ruttan, 7 U. C. R. 97; Sharpe v. Fortune, 9 C. P. 523; Tomlinson v. Jarvis, 11 U. C. R. 60; City of Kingston v. Shaw, 6 U. C. L. J. 280; Corp. Kingston v. Shaw, 20 U. C. R. 223; but under this statute written notice is rendered necessary: Re McGregor v. Norton, 13 P. R. 223. The landlord could not distrain the goods for rent after seizure by the bailiff: Sharpe v. Fortune, supra; Craig v. Craig, 13 L. J. N. S. 326. The fact of a landlord having joined in a bond that the goods distrained should be forthcoming for sale upon a fi. fa. was held not to prejudice his claim for rent: Brown v. Ruttan, 7 U. C. R. 97; nor would the landlord's having distrained and afterwards abandoned the distress, nor even his having bid at the sale of the goods, prejudice such claim for rent: Ib. In Vance v. Ruttan, 12 U. C. R. 632, the facts were that premises had been let for a year at a rental of £75, to be paid on the first of May; and it was agreed that if the tenant should leave before the first of May, the rent was to become payable immediately. The tenant left on the Saturday before the first of May, and on Monday the goods were seized under execution; it was held that the landlord was entitled to his rent, Should a bailiff, acting in good faith for all concerned, agree to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing would be allowed him: Galbraith v. Fortune, 10 C. P. 109. Should a bailiff merely make an inventory of goods seized, leaving no one in possession of them, they would not be in the custody of the law so as to prevent the landlord claiming for the rent due at the time the execution was subsequently attempted to be enforced: Hart v. Reynolds, 18 C. P. 501; but being absent for a mere temporary purpose is not an abandonment: Gordon v. Rumble, 19 A. R. 440; Coffin v. Dyke, 48 J. P. 757; nor if they were left in the hands of a person who undertook to be responsible: Lossing v. Jennings, 9 U. C. R. 406; Duffus v. Creighton, 14 S. C. R. 740. Where at the time an execution was placed in the sheriff's hands there was a claim for unpaid rent, it was held that the sheriff could not delay the seizure until the execution creditor first paid off the rent. His proper course was to seize, but he was not compelled to sell until the rent was paid; and if the execution creditor would not pay it, he might withdraw from possession. In this case the sheriff abstained from seizure on receiving notice of the rent being due, of which the execution creditor was aware when he issued the ft. fa.; and, before he seized, certain crops were removed, sufficient to pay the plaintiff's claim; it was held that the sheriff was liable: Looke v. McConkey, 26 C. P. 475. The same principle would apply in the case of a bailiff. Should a bailiff realize the amount of an execution, he could not justify the retention of the money on the ground that the landlord had made a claim to the whole of it for rent, which he

had not been able to prove the truth of: Hall y. Badden, 7 L. T. N. S. 721. When the bailiff has received notice of rent due he should endeavour to secure legal evidence on that point, and, if possible, inspect the lease, or make inquiry about the terms of holding: Augustien v. Challis, 1 Ex. 279, per Pollock, C.B., at page 280. He should also forthwith give a copy of the notice to the execution creditor or his attorney, so that, if so advised, he might question the landlord's claim under section 269, or otherwise. Although goods seized by a bailiff could not be distrained in his custody, still such goods must be removed within a reasonable time after the sale in order to protect the rights of the purchaser against a distress for rent: Hughes v. Towers, 16 C. P. 287.

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Stating the terms of holding.—The terms should be particularly set out, so that the bailiff may receive such reasonable information as will enable him to decide upon what course to pursue: Tomlinson v. Jarvis, 11 U. C. R. 60. If the bailiff should disregard the notice he would be liable: Galbraith v. Fortune, 9 C. P. 211; Robertson v. Fortune, 9 C. P. 427. The "writing" is by the statute required to contain particulars; and in that respect this section differs from the Statute of Anne: Sharpe v. Fortune, 9 C. P. 523. The form of landlord's claim for rent will be found in the forms. It must be in writing, under the hand of the landlord or his agent. Care should be taken in drawing up the notice, and the bailiff should have nothing to do with it; otherwise, in the event of dispute, he might have no right to an interpleader: Coxy. Balne, 2 D. & L. 718. The notice should be given before the sale, so that the bailiff might sell for the rent as well, under the 271st section: see Arnitt v. Garnett, 3 B. & Ald. 440. As to the claim of the landlord generally, see 6 U. C. L. J. 228, 261; 7 U. C. L. J. 13, 14.

We must impress on the landlord and bailiff the necessity for a close observance of this section, for if the landlord does not observe the requirements of it, his claim might not be recognized, no matter how well founded, and if the bailiff recognized a claim that was not founded on a proper observance of the statute by the landlord he would be liable to the execution creditor for the money which he had so improperly paid the

No time is limited for the claim to be made by the landlord. It is submitted, however, that the claim should be made before any goods have been removed from the premises, so that a distress may thereafter be made pursuant to section 271.

Shall distrain.—The bailiff cannot distrain for the rent upon the goods of a stranger, any more than he can seize such property on the execution: Beard v. Knight, 8 E. & B. 865; Foulger v. Taylor, 5 H. & N. 202; see R. S. O. c. 143, s. 28.

It is doubtful whether exempted goods may be seized, but if the landlord has given the notice required by sub-section 4 of section 30 of R. S. O. c. 143, and the tenant does not offer to give up possession, there would seem to be no reason why the exemptions could not be taken.

The bailiff can be sued by the landlord for the money which he makes for rent, as money had and received: Lockhart v. Gray, 2 L. J. N. S. 163; and it would be garnishable in the bailiff's hands, in a suit against the landlord: Ib.

271. In case of any such claim being so made, the How the bailiff is to bailiff making the levy shall distrain as well for the amount proceed. of the rent claimed, and the costs of the additional distress, as for the amount of money and costs for which the warrant of execution has issued, and shall not sell the same, or

Sections 271-273

any part thereof, until after the end of eight days at least next following after the distress made. R. S. O. 1877. c. 47, s. 212.

Under these sections of the Division Courts Act, the formalities which are necessary in the case of distress for rent by a landlord do not seem to be required of a bailiff. The claim for rent appears to be enforceable as if it were an additional amount payable on the execution, and for the making of such additional sum a separate allowance for costs is made.

Fees of bailiff in

Rev. Stat.

c. 63.

272. For every additional distress for rent in arrear, such cases, the bailiff of the court shall be entitled to have as the costs of the distress, instead of the fees allowed by this Act. the fees allowed by The Act respecting Costs of Distress. R. S. O. 1877, c. 47, s. 213.

> Fees allowed by the Act respecting Costs of Distress.—The "additional distress" here referred to means that which is necessary for the bailiff to make in order to realize the amount of the rent over and above the moneys to be made on the execution:

These fees are :-

Levying distrees under \$80	\$1.00
Man keeping possession, per diem	75
Appraisement, whether by one appraiser or more—two cents in the dollar on the value of the goods:	
If any printed advertisement, not to exceed in all	1.00
Catalogues, sale and commission, and delivery of goods— five cents in the dollar on the net produce of the sale— R. S. O. c. 63, p. 730.	

This section does not incorporate sections 34 and 35 of R. S. O. c. 143, under which additional costs are allowed when the amount of the rent exceeds \$80.

The bailiff is "entitled" to the fees allowed for distress. If the amount of the rent should be large, it is possible that he might waive that right and claim the same fees as would be allowed him on an execution for a like amount.

If replevin

273. If a replevin is made of the goods distrained, so much of the goods taken under the warrant of execution shall be sold as will satisfy the money and costs for which the warrant issued, and the costs of the sale, and the surplus of the sale and the goods so distrained, shall be returned as in other cases of distress for rent and replevin thereof. R. S. O. 1877, c. 47, s. 214.

Goods distrained .-- At common law a tenant had a right to replevy as for an illegal distress his goods distrained for rent, and this section preserves to him that right: see notes to section 72, in which the law relating to replevin in Division Courts is discussed, and Rules infra.

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The replevy can only be made so as to supersede the distress, and the Sections bailiff would, notwithstanding the replevin, be entitled to retain the goods 273-275 to the extent necessary to satisfy the execution: but under section 274, the proceeds of such goods could not be paid over until the landlord was

274. No execution creditor under this Act shall have When landlord's his debt satisfied out of the proceeds of the execution and claim to distress, or of the execution only, where the tenant replevies, be first paid. until the landlord who conforms to the provisions of this Act has been paid the rent in arrear for the periods hereinbefore mentioned. R. S. O. 1877, c. 47, s. 215.

OFFENCES AND PENALTIES.

Contempt of Court.

275. If a person wilfully insults the Judge or acting Contempt Judge or any officer of a Division Court during his sitting or attendance in court, or interrupts the proceedings of the court, any bailiff or officer of the court may, by order of the Judge, take the offender into custody, and the Judge may impose upon the offender a fine not exceeding \$20, and in default of immediate payment thereof, the Judge may by warrant under his hand and seal commit the offender to the common gaol of the county for a period not exceeding one month, unless the fine and costs, with the expenses attending the commitment, are sooner paid. R. S. O. 1877, c. 47, s. 217.

Contempt of Court .- Every Court of Record has an inherent power to punish for contempt: Ex parte Pater, 5 B. & S. 299; Ex parte Lees and the Judge of the County of Carleton, 24 C. P. 214. The statute here confers a power on the Judge of a Division Court which would belong to a Court of Record as one of its inherent attributes. In Carus Wilson's case, 7 Q. B., p. 1015, Lord Denman, C.J., says: "But here it appears that a contempt was supposed to have been committed. That is, a case in which it becomes the unfortunate duty of a court to act as both party and judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return (to Habeas Corpus) that they have come to a wrong conclusion. A court may be insulted by the most innocent words, uttered in a peculiar manner and tone. The words here might or might not be contemptuous, according to the manner in which they were spoken, and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the Royal Court (of Jersey) with which no other court can meddle. Every court in such a case has to form its own judgment." At page 1017 of the same report, Williams, J., says:

"It is quite obvious that contempt may be shewn either by language or manner. We can imagine language which might be perfectly proper if uttered in a temperate manner, but might be grossly improper if uttered in a different manner. No one not present can be a competent judge of this." Speaking of the prisoner's conduct in that case, Wightman, J., says, at page 1018; "It seems to me that it might be contemptuous as being highly disrespectful, although the words themselves are not necessarily so." In the case of In re the Judge of the Division Court of Toronto, 23 U. C. R. 376, Draper, C.J., is reported, at page 378, as saying: "The power of punishing contempts by fine is given by statute to the Judge of a Division Court, and such a power, though like any other power by which a man becomes as it were a judge in his own cause, and can exercise his authority without any direct control, and perhaps without any responsibility, is dangerous as open to abuse, is nevertheless found indispensable. Contempts are perhaps the most undefinable of offences, for they may consist in looks and demeanour, as well as in positive acts and expressions; and though our statute uses the words 'wilfully insults,' it does not appear to me to change the application or extent of the power given." Again, at page 379, the same learned Judge says: "It is more easy to feel than describe how an advocate may exhaust the patience and wear the temper of any Judge by continually keeping on the verge of what he well knows to be forbidden ground, and by occasionally overstepping the line after oft-repeated check and caution from the bench, in the ardour, real or affected, of his zeal for his client. When such conduct is long persevered in, it produces almost inevitably in the Judge's mind a sense that it requires scrupulous watching in order that the advocate may, if possible, be restrained within proper limits; or, if he will exceed them, may, if necessary, be promptly punished; and thus it may well happen that the Judge may pronounce the advocate to be in con-tempt, where a by-stander, who knew nothing beyond the immediate occurrence, might deem the decision harsh or even unwarrantable." In Ex parte Pater, 5 B. & S., at page 312, Blackburn, J., says: "I agree that when we are considering a question of contempt, we ought to see whether the inferior court had reasonable grounds for adjudging that a contempt had been committed; but we must bear in mind that the court is the judge whether it has been treated with contempt, as Lord Denman said in the case of Carus Wilson, 7 Q. B., 984-1015, for, looking to the nature of the contempt, it may consist in the peculiar manner and tone with which words are spoken." The power conferred on the Judge by this section is confined to contempts committed in court, and he would have no power under it to proceed against a person for a contempt committed out of court: R. v. Lefroy, L. R. 8 Q. B. 134; see also 4 U. C. L. J. 243, and 4 U. C. L. J. 259; 11 L. J. N. S. 156, on the general question of contempt of court; but the power given by this section would not restrict the po vers of the Judge under section 73: R. v. Surrey (Judge), 13 Q. B. D. 963. Should the Judge act under this section, the penalty can be imposed and enforced instantly: Watt v. Ligertwood, L. R. 2 Scotch App. 361: see also Baird v. Story, 23 U. C. R. 624. In the case of In re Pollard, L. R. 2 P C 106, the Judicial Committee held that where the court did not impose the fine on the committing of the contempt, but delayed it, and then on a subsequent day imposed the penalty, without an opportunity of the party's answering the charge, such proceeding was illegal.

An insult to the clerk or any officer during the sitting of the court, and, though not actually in the presence of the Judge, within the precincts of the court, might be punishable under this section: see, Re Johnson, 20 Q. B. D. 68.

A small room communicating with a larger one is not open court: Kenyon v. Eastwood, 57 L. J. Q. B. 455. language or otly proper if per if uttered tent judge of ightman, J., temptuous as re not necesrt of Toronto, ying: "The he Judge of a wer by which n exercise his any responsiınd indispennces, for they tive acts and fully insults,' t of the power : " It is more patience and the verge of sionally overthe bench, in hen such conin the Judge's that the advoor, if he will d thus it may e to be in conhe immediate antable." In "I agree that to see whether at a contempt he court is the enman said in the nature of ne with which this section is have no power mmitted out of L. J. 243, and

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Wilfully insults.—A "wilful insult," is one that arises from the Section spontaneous action of the will. It amounts to nothing more than this, "that he knows what he is doing and intends to do what he is doing and is a free agent:" Re Young and Re Harston, 31 Ch. D. 174.

To observe to a Judge in the course of and in reference to his judgment, that "That is a most unjust remark" is an insult to the court in whatever manner it is impressed, and, if not withdrawn, it amounts to such a "wilful insult" as is contemplated by the section: R. v. Jordan, 36 W. R. 589, 797.

Interrupts the proceedings.—Anything unseemly said or done by any person which would interfere with the conduct of the business of the court, or that would be highly indecorous, might be the subject of a penalty under this clause.

Take the offender into custody.—Power is here given to the Judge to order the person to be taken into custody, so that he might be brought before him to answer for his misconduct. The limit of the fine is twenty dollars, and no greater fine could be imposed.

Immediate payment.—The word "immediate" here does not mean "instantly." A reasonable time would be allowed the delinquent for payment of the money: Toms v. Wilson, 4 B. & S. 455; Forsdike v. Stone, L. R. 3 C. P. 607; Massey v. Sladen, L. R. 4 Ex. 13; In re Sillence, 7 Ch. D. 238. As remarked by Cockburn, C.J., at page 453 of 4 B. & S., "he might require time to get it from his desk, or to go across the street, or to his banker's for it."

Under his hand and seal.—The plain words of the section require this commitment to be under the hand and seal of the Judge: see also 3 L. C. G. 14. It differs in that respect from a commitment under the 240th section: see Rules and Forms; Ex. parte Heymann. In re Heymann, L. R. 7 Ch. 488; Ex parte Waters. In re Waters, L. R. 18 Eq. 701.

It will be necessary for the commitment to shew whether the defendant is fined for insulting the Judge or an officer, or for interrupting the proceedings. The nature of the insult need not be stated: Levy v. Moylan, 10 C. B. 189.

Power is given to the Division Court to impose fines under certain circumstances, and as it is an extraordinary power, its exercise must be carefully guarded: Re Clements, 46 L. J. Ch. 375.

As remarked in Day v. Carr, 7 Ex. 887, by Martin, B., a power to imprison without the intervention of a jury, except upon strong grounds, ought not to be exercised.

In courts of record a contempt is usually punished by imprisonment. For the contempts enumerated in this section, a Division Court Judge has no power to imprison except as a means of enforcing payment.

A direct order for imprisonment would be invalid.

For form of order of committal, see Forms.

For a refusal to comply with an order of the court made in the exercise of its jurisdiction, the Judge would have power, under section 73, to make an order for committal: Martin v. Bannister, 4 Q. B. D. 491; Richards v. Cullerne, 7 Q. B. D. 623.

Mere compliance with the order would not entitle the person committed to be released. A formal application for release would be necessary: Re Davies, 21 Q. B. D. 236.

Sections 275-276 Habeas corpus.—An appellate court will not review the order of committal except where there is no reasonable evidence of the contempt and the liberty of the subject requires protection: R. v. Jordan, 36 W. R. 589, 797.

Resisting Officers.

Assaulting bailiff.

276. If any officer or bailiff (or his deputy or assistant) be assaulted while in the execution of his duty, or if any rescue be made or attempted to be made of any property seized under a process of the court, the person so offending shall be liable to a fine not exceeding \$20, to be recovered by order of the court, or before a Justice of the Peace of the county or city, and to be imprisoned for any term not exceeding three months, and the bailiff of the court, or any peace officer, may in any such case take the offender into custody (with or without warrant) and bring him before such court or Justice accordingly. C. S. U. C. c. 19, s. 184.

Resisting Officers.—See English County Courts Act, 1898, s. 48. A bailiff leaving goods and going to a public house for refreshments a mile distant would be entitled to re-enter on his return and any assault on him to prevent such re-entry would make the offender liable under this section: Coffin v. Dyke, 48 J. P. 757.

This section, as originally framed, made provision for criminal procedure, but in the late revision of the statutes its language has been changed so as to bring it within the authority of the Legislature of Ontario.

Section 306 of the Criminal Code, 1892, is as follows:

"Everyone commits theft and steals the thing taken or carried away, who whether pretending to be the owner or not, secretly or openly, and whether with or without force or violence takes or carries away without lawful authority any property under lawful seizure and detention."

Section 144 also makes it an offence to disturb anyone in the lawful execution of any process or in making any lawful distress or seizure: see Coffin v. Dyke, 48 J. P. 757.

It will be observed that the section extends to an assault upon or rescue from a deputy or assistant bailiff. Probably the bailiff or deputy bailiff could alone make the original arrest or seizure, or at any rate his presence thereat would be necessary: The Palomares, 52 L. T. N. S. 57. Both fine and imprisonment may be awarded.

The fine would be enforceable by execution issued from the court:

If an assistant bailiff wrongfully arrested a person, as for an offence under this section, the bailiff would be responsible: Gordon v. Rumble, 19 A. R. 440.

If there should be any question as to the liability of the party complained against, or if there should not be any necessity for his immediate arrest, a summons might be issued by the Judge or justice.

For forms of summons and order, see Forms.

If the bailiff proceed under this section he is not thereby prevented from suing and recovering for the assault upon him: Box v. Green, 9 Ex. 503.

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Misconduct of Clerks, Bailiffs, Etc.

Section 277

277. If a bailiff or officer, acting under colour or pre-Miscontence of the process of court, is guilty of extortion or duct of misconduct, or does not duly pay or account for all money balling. levied or received by him by virtue of his office, the Judge, at a sitting of the court, if a party aggrieved thinks fit to complain to him in writing, may enquire into the matter in a summary way, and for that purpose he may summon and enforce the attendance of all necessary parties and witnesses, and may make such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied or received, and for the payment of any such damages and costs to the parties aggrieved, as he thinks just; and in default of payment of the money so ordered to be paid by the bailiff or officer within the time in the order specified for the payment thereof, the Judge may, by warrant under his hand and seal, cause such sum to be levied by distress and sale of the goods of the offender, together with the reasonable charges of the distress and sale, and in default of such distress (or summarily in the first instance), may commit the offender to the common gaol of the county for a period not exceeding three months. R. S. O. 1877, c. 47, s. 218.

Acting under colour or pretence of process.—See English County Courts Act, 1888, s. 50. This would cover a case where a bailiff had not any process of the court, but assumed to act as if he had: see 7 U.C.L.J. 229, 230 and 260.

Extortion.—The offence of extortion consists in a public officer "taking under colour of office from any person any money or valuable thing which is not due from him at the time when it is taken." "If the illegal act consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offence is called "oppression:" Stephens, Cr. 83. See R. v. Tisdale, 20 U. C. R. 272; Parsons v. Crabbe, 31 C. P. 151.

For an unintentional overcharge, no penalty should be inflicted: Shoppee v. Nathan & Co. (1892), 1 Q. B. 245.

The wrong must be done with the mens rea or intention of committing the offence: Lee v. Dangar, (1892), 1 Q. B. 231, affirmed on appeal, 8 T. L. R. 494; (1892), 2 Q. B. 337.

Misconduct.—The term "misconduct" is very vague. It is submitted that for the penal purposes of this section no greater meaning should be given to it than would be given to the same term in the covenant of the sureties: see notes to section 35.

Sections 277-279

Wilful misconduct is a criminal offence; see section 148, Criminal Code, 1892.

Duly pay.—Great delay in payment would be a proper ground for punishing the officer.

A bailiff should not mix moneys levied by him with his own money: Milltown v. Boardman, 10 C. L. T. 250.

Complain to him in writing.—The complaint must be in writing (Re McGregor v. Norton, 18 P. R. 228), by the party aggrieved, and not by a stranger, and inquired into at some court sittings.

The bailiff and his witnesses, if any, must have an opportunity to be present: 4 U. C. L. J. 132; Osgood v. Nelson, L. R. 5 H. L. 636; note to section 44, ante p. 36.

May commit the offender.—The Judge has power only to order repayment of moneys exterted or withheld, or actual damage sustained by the party aggrieved.

He has no power to fine. The warrant of distress or commitment to gaol must be under the hand and seal of the Judge. The Judge need not go through the formality of distress, but may order committal as the only alternative of payment.

For form of order see Forms.

This being a quasi criminal proceeding questions of doubt are to be construed favorably to the accused: North Ontario Election, H. E. C. 342.

Extortion.

Extortion.

278. If a clerk, bailiff or other officer exacts or takes any fee or reward other than the fees appointed and allowed by law for or on account of anything done by virtue of his office, or on any account relative to the execution of this Act, he shall, upon proof thereof before the court, be forever incapable of being employed in a Division Court in any office of profit and emolument, and shall also be liable in damages to the party aggrieved. R. S. O. 1877, c. 47, s. 219.

Extortion. - See notes to section 277.

The clause is a penal one and must be strictly construed: 4 U.C. L.J. 132; and the officer should have full opportunity of defending himself: notes to sections 44 and 277.

Extortion is punishable at common law by indictment, but indictments can only be maintained against the person actually guilty of the offence, and the bailiff is not liable to an indictment for the offence of his assistant: Woodgate v. Knatchbull, 2 T. R. 148; 1 R. R. 449; Saunderson v. Baker, 3 Wils. 309.

Negligence of Bailiffs.

If bailiffs neglect in relation tion.

279. In case a bailiff employed to levy an execution their duty against goods and chattels, by neglect, connivance or omisto execu- sion, loses the opportunity of so doing, then upon complaint

of the party thereby aggrieved, and upon proof of the fact Sections alleged to the satisfaction of the court, the Judge shall order the bailiff to pay such damages as it appears the plaintiff has sustained, not exceeding the sum for which the execution issued, and the bailiff shall be liable thereto; and upon demand made thereof and on his refusal to satisfy the same, payment shall be enforced by such means as are provided for enforcing judgments recovered in the court.

Negligence of bailiffs.—A summary power is here given to the Judge to be exercised over the bailiff if he should neglect his duty in regard to an execution placed in his hands. Should damages be awarded and paid by the bailiff under this section, it is submitted that he could not be rendered civilly responsible otherwise. A summons must be issued and served on the bailiff: Mayer v. Burgess, 4 E. & B. 655.

R. S. O. 1877, c. 47, s. 220.

Wilfully making a false return is a criminal offence: section 143 of Criminal Code, 1892.

A bailiff acting under a transcript could not be proceeded against in the home court. The Judge has power merely against the bailiffs of his own courts: R. v. Judge of County Court of Shropshire, 20 Q. B. D. 242.

Upon demand.—This would be a necessary preliminary to execution: Davidson and the Chairman of Q. S. Waterloo, 24 U. C. R. 66; Trustees of the School Sec. No. 3 of the Township of Caledon v. Corp. of Tp. of Caledon, 12 C. P. 301; Bamford v. Clewes, L. R. 3 Q. B. 729; see also 10 U. C. L. J. 236.

Such means as are employed for enforcing judgments.—That is by execution, as pointed out by section 212, and in default of the money being made in that way, by the same means otherwise as could be resorted to against an ordinary debtor.

The execution against the bailiff might be issued to a person other than himself; for it would be absurd to issue a warrant to the bailiff to levy on himself.

This can be done under the inherent power of all courts to enforce their judgments, and by adopting the principles of practice of the High Court when a sheriff and coroner are interested, viz.: by the appointment of elisors: Bellamy v. Hoyle, L. R. 10 Ex. 220; see Hawkins P. C. b. 2, c. 22, s. 2; Andrews v. Sharp, 2 W. Bl. 911; R. v. Peckham, 2 W. Bl. 1218.

280. If a bailiff neglects to return an execution Action within three days after the return day thereof, or makes a bailiff and false return thereto, the party who sued out the writ may for neglect of bailing maintain an action in any Court having competent juris-in returning executive. diction against the bailiff and his sureties on the covenant tion. entered into by them, and shall recover therein the amount for which the execution issued, with interest thereon from

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Sections 260-261

the date of the judgment, or such less sum as in the opinion of the Judge or jury the plaintiff under the circumstances is justly entitled to recover. R. S. O. 1877, c. 47, s. 221.

Within three days after the return day .- In this case the time would be reckoned thus; if the last of the 30 days during which an execution was in force should, for instance, be the 30th of September, the return to it should be made not later than the 3rd of the next month. Should the bailiff's sureties be changed between the time he received the execution and when he made default in returning it, the sureties when default made would be those liable: Dicey on Parties to Action, 225, et seq.; 8 U. C. L. J. 35. If a seizure should be made within the thirty days, the execution would be partly executed, and the bailiff could go on and complete it after that time; see notes to section 212. Such a case could not be called a neglect to return an execution within this section. If the bailiff neglects to return any process or execution in the proper time, he forfeits his fees on it: see section 220 and notes thereto.

A false return is also a criminal offence, if wilful: Criminal Code. 1892, section 143.

In the opinion of the Judge or jury.—This leaves it to the Judge or jury to award damages commensurate to the loss: see Macrae v. Clarke, L. R. 1 C. P. 403.

This section seems to presume that the bailiff could, if he had been vigilant in the execution of his warrant of execution, have made the money. If there are circumstances which might show the contrary, we think the onus of proving them is cast upon the bailiff and his sureties: Macrae v. Clarke, L. R. 1 C. P. 403; Hobson v. Thelluson, L. R. 2 Q. B. 642.

The omission to return the execution within the prescribed time would of itself be prima facie evidence of neglect on the part of the bailiff.

The right to sue under this section would no be governed by any statutory right such as is accorded t sui'rs on bonds given in Division Court proceedings: see section 900 e jurisdiction to sue would be regulated by the law that would a the case of any other cause of action for a similar wrong.

Execution

281. If a judgment is obtained in the action against the may issue instanter, bailiff and his sureties, execution shall immediately issue bailiff has thereon, and in case of the departure or removal of the ailiff his sureties from the limits of the county, the action may be commenced neverthe less liable and carried on against his sureties alone, or against any one or more of them. R. S. O. 1877, c. 47, s. 222.

> Execution shall immediately issue thereon.—This takes away from the court in which the action is brought, the power of postponing the issue of execution in such suit against the bailiff and his sureties. If the bailiff departs or removes from the limits of the county, an action may be brought against his sureties jointly or severally for the recovery of the damage sustained. This is contrary to the general rule on the subject: Exchange Bank v. Barnes, 29 Gr. 270.

> Whether the bailiff has departed or removed from the county is a question of fact to be determined in the ordinary way.

> Two of the sureties could be sued together under this section in the event of the removal of the bailiff from the county: see notes to section 69.

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FINES, HOW ENFORCED.

Sections 232-288

282. In case a Division Court imposes a fine under Fines, how authority of this Act, the same may be enforced upon the by Division Courts. order of the Judge, in like manner as a judgment for any sum adjudged therein, and shall be accounted for as herein provided. R. S. O. 1877, c. 47, s. 223.

Fines, how enforced.—Provision is here made for fines imposed whether payable for contempt or otherwise. The Judge cannot order the imposition and enforcement of any fine unless some statutory enactment expressely confers the power.

The payment of the fine would not bar another action for the wrong, e.g., an assault: Box v. Green, 9 Ex. 503.

In like manner as a judgment.—See notes to sections 212, 228 and

And shall be accounted for .- See section 57. All fines must be paid over to the County Crown Attorney under section 293

283. In all cases in which by this Act a penalty or for-enforced feiture is made recoverable before a Justice of the Peace, by Justices such Justice may, with or without information in writing, Peace. summon before him the party complained against, and thereupon hear and determine the matter of the complaint, and on proof of the offence convict the offender, and adjudge him to pay the penalty or forfeiture incurred, and proceed to recover the same. R. S. O. 1877, c. 47, s. 224.

Is made recoverable.—This has reference to summary convictions: see sections 52 and 276.

With or without information in writing.—There must, however, be an information of one kind or the other to warrant the proceedings: Caudle v. Seymour, 1 Q. B. 889; Appleton v. Lepper, 20 C. P. 188; Connors v. Darling, 23 U. C. R. 550; Stoness v. Lake, 40 U. C. R. 320; Crawford v. Beattie, 39 U. C. R. 13; unless the defenpant waives it: R. v. Shaw, 12 L. T. N. S. 470; Blake v. Beech, 1 Ex. D. 320.

The mode of bringing the accused before the justice would not be a good ground for quashing the conviction: R. v. Menary, 19 O. R. 691.

Convict the offender.—The justice must observe the same regularity of proceeding as would be required of him on the trial of any other offence punishable on summary conviction.

But should the party voluntarily appear without the formalities required by this section and raise no objection, he could be proceeded against in the ordinary way: R. v. Hughes, 4 Q. B. D. 614.

In any proceeding under this or the following section, or in any other proceeding in the Division Court, for which a statutory form is given, it is sufficient to follow such form, although not strictly containing all which the statute requires: In re Wilson v. The Quarter Sessions of Huron and Bruce, 28 U. C. R. 301: Spigener v. State, 62 Ala. 383;

Sections 2 C. L. T. 125; Thompson v. Farr, 6 U. C. R. 390, per Robinson, C.J.; Reid v. McWhinnie, 27 U. C. R. 289; Cornwall v. The Queen, 33 U. C. R. 106; R. v. Johnson, 8 Q. B. 102; Fletcher v. Calthrop, 6 Q. B. 880; R. v. Marsh, 2 B. & C. 717; R. v. Hazzell, 13 East, 139; R. v. Ridgway, 2 B. & Ald. 527; In re Turner, 9 Q. B. 80; Nixon v. Nanney, 1 Q. B. 747; R. v. Jones, 12 A. & E. 684; R. v. Recorder of King's Lynn, 3 D. & L. 725; R. v. Hartley, 20 O. R. 481; R. v. Richardson, 20 O. R. 514; R. v. Inhabitants of Hickling, 7 Q. B. 880, at p. 889.

> It was also held that Forms, though literally prescribed by the legislature may be varied according to reason and common sense, so long as the material matters provided for are correctly given: Gemmill v. Garland, 12 O. R. at p. 142; Mountcashell v. O'Neill, 5 H. L. Cas. 937; Ex parte Stanford. In re Barber, 17 Q. B. D. 259. The same principle was laid down by Patterson, J.A., in Northcote v. Brunker, 14 A.R. 364 at p. 378. The courts will always endeavour to uphold the proceedings of a justice where it is obvious that he has been actuated by a desire to follow the directions of the legislature; and for obvious reasons justices will find it best to follow as nearly as possible the forms given in the statute: see also remarks by Pollock, C.B., In re Allison, 10 Ex. 561 at p. 565, and of Parke, B., in the same case, who said: "If justices substantially adopt the forms given, they do all that is required of them."

Form of conviction.

284. In all cases where a conviction is had for any offence committed against this Act, the form of conviction may be in the words or to the effect following, that is to

Be it remembered, that on this in the year , A. B. is convicted before one (or two as the case may be) of Her Majesty's Justices of the Peace for the County of (or before a County Judge of), acting under The Division Courts Act, of having the County of (note the offence); and I, (or we) , the said to forfeit and pay for the same the sum of adjudge the said , or to be committed to the Common Gaol of the County of for the space of

hand and seal, the day and year afore-

R. S. O. 1877, c. 47, s. 225.

The form of conviction. - See the notes to the next previous section.

PROTECTION OF PERSONS ACTING UNDER WARRANTS, ETC.

Demand of perusal warrant to be made before

Given under

said.

285. No action shall be brought against the bailiff of and copy of a Division Court, or against any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand of the clerk and seal of the court until a written demand, signed by the person intending to bring the action, of the perusal, and a copy of the warrant has by such person, his solicitor or agent, been served upon or

binson, C.J.; n, 33 U. C. R. B. 880; R. v. v. Ridgway, 2 , 1 Q. B. 747; nn, 3 D. & L. R. 514; R. v.

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ne bailiff of by his order o any warcourt until ng to bring rant has by ed upon or left at the residence of the bailiff, and the perusal and copy have been neglected or refused for the space of six days after the demand. R. S. O. 1877, c. 47, s. 226.

Section 285

Acting under warrant.—A clerk issuing a warrant under the seal of the court and a bailiff and his assistants acting thereunder, are protected, even assuming that the Judge has no jurisdiction to make the order under which the warrant is founded: Aspey v. Jones, 33 W. R. 217; London (Mayor) v. Cox, L. R. 2 H. L. 269.

Protection of persons acting under warrants, etc.— The public interest requires that officers who really act in obedience to a warrant should be protected. In such cases, therefore, the Act has provided that the remedy of the party grieved shall be confined to the clerk as well where he has issued a warrant within his jurisdiction as where the warrant he has issued is improper. The Act takes it for granted, if after demand a perusal has been allowed, that the officer may be said to act in obedience to the warrant, though the clerk had no jurisdiction, and though the warrant be an absolute nullity: Price v. Messenger, 2 B. & P. 158; 5 R. R. 559.

The protection is given notwithstanding the defect appears by the warrant.

This protection is not merely conferred on the officer, but is extended to anyone, "acting by his order and in his aid," in the due execution of the process of the court: see, also, 9 U. C. L. J. 317; Pearson v. Ruttan, 15 C. P. 79; Pedley v. Davis, 10 C. B. N. S. 492.

The baniff is protected, under this section, only when he is sought to be made responsible for some defect in the process under which he acts: Stewart v. Cowan, 40 U. C. R. 346.

Against any person acting by his order.—The person must be acting under the authority of a bailiff, and in his aid: Postlethwaite v. Gibson, 3 Esp. 226.

A demand upon such person would be insufficient; it must be made upon the bailiff: Clarke v. Davey, 4 Moore, 465.

A gaoler who received the person named in a warrant of commitment from the bailiff would be protected: Butt v. Newman, Gow, 97.

A written demand.—The demand should be made out in duplicate and signed by the party himself: Toms v. Cumming, 7 M. & G. 88, 92. But if signed by his attorney it will, it seems, be sufficient: Carke v. Woods, 2 Ex. 395.

The party, by his conduct, may dispense with the perusal: Atkins v. Kilby, 11 A. & E. 777.

It would be unnecessary to make a demand where no action would lie against the clerk: Sturch v. Clarke, 4 B. & Ald. 113; Cotton v. Kadwell, 2 N. & M. 399; Sly v. Stevenson, 2 C. & P. 464.

If the warrant commands the bailiff to seize the goods of A. and he seizes those of B. no demand is necessary: Parton v. Williams, 3 B. & Ald. 330; or if he acts beyond what is required by the warrant or out of his own county: Gladwell v. Blake, 1 C. M. & R. 636; or does a wrong, not acting or believing he is acting in the discharge of his duty as bailiff: Stewart v. Cowan, 40 U. C. R. 346; or if he broke and entered a house to seize goods: Bell v. Oakley, 3 M. & S. 259; or if he seized other goods than those authorized by the warrant: Price v. Messenger, 2 B. & P. 158; Crozier v. Cundey, 6 B. & C. 232; or if he arrests A. under a warrant against B., though A. may have been the person intended: Hoye v. Bush, 1 M. & G. 775.

Sections 285-286

Signed by the person.—If signed by the party's attorney it will be sufficient: Clark v. Woods, 2 Ex. 395.

Served upon.—See notes to section 99 and 109.

Left at the residence.—See notes to section 99. A notice left by the clerk of the party's attorney is sufficient: Clark v. Woods, 2 Ex. 395.

Six days after such demand.— The demand need not specify any time, and if a different time is mentioned than that allowed by the statute, it does not vitiate it: Collins v. Rose, 5 M. & W. 194.

The sections apply to actions of trespass and case only: Lyons v. Golding, 3 C. & P. 586; and not to assumpsit, replevin, or the like: Gay v. Matthews, 4 B. & S. 425.

Bailiff entitled to verdict on production

286. In case, after the demand and compliance therewith by shewing the warrant to and permitting a copy of warrant, thereof to be taken by the person demanding the same, an action is brought against the bailiff or other person who acted in his aid for any such cause without making the clerk of the court who signed or sealed the warrant a defendant, then on producing or proving the warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in or appearing by the warrant. R. S. O. 1877, c. 47, s. 227.

> By the person demanding the same.—The bailiff should, within the prescribed time after such demand, shew the warrant and permit a copy thereof to be taken by the person demanding the same. If he does so, and an action is brought against him or the person acting by his order or in his aid, either with or without making the officer of the court who signed or sealed the warrant a defendant, then, on the production or proof of such warrant at the trial, the jury will be directed to find for the bailiff, notwithstanding a defect of jurisdiction or other irregularity in or appearing by the warrant.

> The bailiff should have the warrant in his possession when he acts upon it: Galliard v. Laxton, 2 B. & S. 863; R. v. Chapman, 12 Cox C. C. 4; Codd v. Cabe, 1 Ex. D. 352.

> Though the party may have obtained a copy of the warrant, before making the demand, the bailiff must comply with the demand: Clark v. Woods, 2 Ex. 395.

On producing or proving the warrant.—The production or proof of the warrant is necessary to free the bailiff from responsibility: ace Peppercorn v. Hoffman, 9 M. & W. 618; Kalar v. Cornwell, 8 U. C. R. 168. And the fact that it was at the time with the gaoler is no answer: Arnott v. Bradly, 28 C. P. 1; unless the party on information of this circumstance made no objection: Atkins v. Kilby, 11 A. & E. 777. Though the clerk may be joined with the bailiff in an action the bailiff will not be discharged unless he has complied with the demand: Clark v. Woods, 2 Ex. 395.

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287. If an action is brought jointly against the clerk sections 287-288 and bailiff, or the person who acted in his aid, then on If clerk proof of the warrant the jury shall find for the bailiff or and ba the person who so acted, notwithstanding such defect or dants, bailiff irregularity as aforesaid; and if a verdict is given against entitled to the clerk, the plaintiff shall recover his costs against him, producing to be taxed by the proper officer in such manner as to costs. include the costs which the plaintiff is liable to pay to the plaintiffs to. defendant for whom a verdict has been found. R. S. O. 1877, c. 47, s. 228.

On proof of the warrant.—See notes to the two next previous sections. Should a judgment be given against the clerk and for the bailiff, the clerk would be liable to pay the plaintiff the bailiff's costs against him; but they must be taxed in the manner pointed out by the section.

288. In such action the defendant may plead not guilty Defendant may plead entering a note of this Act in the margin, and in such case not guilty by statute. may thereupon avail himself of the matters of defence herein given. R. S. O. 1877, c. 47, s. 229.

May plead not guilty.—This means substantially the same as the language used in the 229th section of the former Division Court Act.

The plea of not guilty by statute, is usually permitted in such cases as those where officers or persons who are sued for something done in discharge of their public or official duties. It is not, however, confined to such cases.

A plaintiff who voluntarily accompanied and assisted a bailiff in seizing goods was held entitled to the same rights on this plea as the bailiff: Culverson v. Melton, 2 M. & Rob. 200.

The defendant may go into any defence that could be specially pleaded. whether founded entirely on the statute, or partly on the statute and partly not, or is a defence wholly independent of the statute: Maund v. Monmouthshire Canal Co., 1 Car. & M. 606. For instance, contributory negligence may be given in evidence under this plea in an action of negligence: Doan v. Michigan Cent. Ry. Co., 17 A. R. 481.

The plaintiff cannot oust the defendant of this plea by waiving the tort and suing in contract: Calvert v. Moggs, 10 A. &. E. 632.

The plea should refer to the statute which allows the plea as well as any other statute relied on by the defence: Van Natter v. Buffalo & Lake Huron Ry. Co., 27 U. C. R. 581.

Where it is intended to rely upon the want of service of a notice of action, the particular section requiring notice must be referred to: Bond v. Conmee, 15 O. R. 716; 16 A. R. 398.

If, however, the plaintiff is not taken by surprise, an amendment is almost a matter of course: Edwards v. Hodges, 15 C. B. 477; Van Natter v. Buffalo & Lake Huron Ry. Co., 27 U. C. R. 581.

Particulars of the defence were ordered in Jennings v. G. T. Ry. Co., 11 P. R. 300. In the higher courts such particulars could in any event be elicited on an examination for discovery.

GENERAL PROVISIONS WITH REGARD TO ACTIONS FOR THINGS DONE UNDER THIS ACT.

Distress not to be deemed unlawful or persons making it trespassers by reason of defect in proceed-ings.

trespassers ab initio.

289. No levy or distress for a sum of money to be levied by virtue of this Act shall be deemed unlawful, or the person making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, conviction, warrant, precept or other proceeding relating thereto, nor shall the person distraining be deemed a tres-Not to be passer from the beginning, on account of any irregularity afterwards committed by him; but the person aggrieved by the irregularity may recover full satisfaction for the special damage. R. S. O. 1877, c. 47, s. 230.

Any defect or want of form.—The tendency of modern legislation is in favour of preventing any formal defect, defeating the ends of justice, or subjecting a person who acts honestly to an action for damages: Crawford v. Beattie, 39 U. C. R. 13, and cases there cited.

This section bears a close resemblance to section 19 of the English statute, 11 Geo. II., c. 19, in respect of an action for an irregular and illegal distress for rent, which provides that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress shall not be deemed unlawful nor the distrainor a trespasser ab initio; but the party grieved may recover satisfaction for the damage in a special action of trespass on the case, at the election of the plaintiff, and if he recover he shall have full costs.

A trespasser from the beginning-"When entry, authority or license is given by the law and he doth abuse it, he shall be a trespasser ab initio. But where an entry, authority or license is given by the party and he abuses it, then he must be punished for his abuse, but shall not be a trespasser ab initio." Six Carpenter's Case, 8 Coke, 146a; Smith's L. C. 261. Not doing cannot make the party who has authority or license by the law a trespasser ab initio, because not doing is no trespass: Ib.

The distinction is that if the party be a trespasser from the beginning, the jury may award damages for the trespass, but if the party is merely punished for special damage, actual loss must be proved and the damages confined to such loss.

Satisfaction for the special damage.—Special damage must be proved, and if not, the plaintiff could not recover even nominal damages, and the verdict or judgment should be for the defendant: Lucas v. Tarleton, 3 H. & N. 116; Rodgers v. Parker, 18 C. B. 112; see also Fell v. Whittaker, L. R. 7 Q. B. 120; Shultz v. Reddick, 43 U. C. R. 155.

Special damages must be claimed, otherwise they are not recoverable, and it must be alleged with certainty so as to enable the defendant to meet it by counter-evidence, if untrue: Westwood v. Cowne, 1 Stark. 172; see also Croft v. Boite, 1 Wms. Saund. 243, d. (5); Martin v. Henrickson, Ld. Raym. 1007; Ashley v. Harrison, 1 Esp. 48; Tilk v. Parsons,
 C. & P. 201; Finlay v. Chirney, 20 Q. B. D. 494; Catton v. Gleason, 14 P. R. at p. 226.

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290. Any action or prosecution against any person for Section anything done in pursuance of this Act shall be commenced within six months after the fact was committed, and shall of actions for things be laid and tried in the county where the fact was commit-done under this Act. ted, and notice in writing of the action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action. R. S. O. 1877, c. 47, s. 231.

Limitation

In pursuance of this Act.—The protection of the statute extends to all persons intending to act within them: Briggs v. Evelyn, 2 H. Bl. 114; 3 R. R. 354. If it be equivocal in what capacity the party acted, notice should be given: Morgan v. Palmer, 2 B. & C. 729. Even though a party acted without jurisdiction, he is entitled to notice of action, if he acted in the honest belief that he was acting in the execution of his duty: Snider v. Brown, 17 A. R. 173; Hermann v. Seneschal, 13 C. B. N. S. 392; Selmes v. Judge, L. R. 6 Q. B. 724; Roberts v. Orchard, 2 H. & C. 769; Leete v. Hart, L. R. 3 C. P. 322; Calder v. Halket, 3 Moo. P. C. 36n; Venning v. Steadman, 9 S. C. R. 238; but if he has acted colourably and vexatiously from any malicious or corrupt feeling, without believing he had authority to do what he did, he is not entitled to notice: Bross v. Huber, 18 U. C. R. 282. And if there is no evidence of honest belief in the right to do the act, the court will hold the notice of action to be unnecessary: Friel v. Ferguson, 15 C. P. 584; Ibbottson v. Henry, 8 O. R. 625; but see Bross v. Huber, 18 U. C. R. 282.

If there is evidence of want of good faith, the question must be submitted to the jury if the plaintiff desire it : Neill v. McMillan, 25 U. C. R. 485; Stewart v. Cowan, 40 U. C. R. 346; Allen v. McQuarrie, 44 U. C. R. 62; Sinden v. Brown, 17 A. R. 188.

A Judge would be entitled to notice of action, even though the action was brought for making an order for committal after prohibition, if the Judge acted under a bona fide belief that his duty as Judge rendered it incumbent on him to do so, notwithstanding the prohibition: Booth v. Clive, 10 C. B. 827.

A bailiff acting under a warrant without a seal, is entitled to notice: Anderson v. Grace, 17 U. C. R. 96.

If in fact disqualified from acting, a party acts in the bona fide belief that he is qualified, he is entitled to notice: Hughes v. Buckland, 15 M. & W. 346; Lea v. Facey, 19 Q. B. D. 352.

The plaintiff cannot by waiving the tort and suing in assumpsit, avoid giving notice of action: Waterhouse v. Keen, 4 B. & C. 211. Therefore, where a defendant has wrongfully received money and kept it, and the plaintiff sued for money had and received, the want of notice of action was held fatal to his case: Midland Ry. Co. v. Withington Local Board, 11 Q. B. D. 788.

If an act was wrongful, but the defendant relies upon his honest belief to do the act as giving him the right to notice, some facts must be shewn which might give rise to that belief, but it is not necessary that the belief should be reasonable: Chamberlain v. King, L. R. 6 C. P. 474.

A bailiff is entitled to notice of action even if indemnified: Sanderson v. Coleman, 4 U. C. R. 119; Lough v. Coleman, 29 U. C. R. 367; or if, having an execution against the goods of A. he takes the goods of B.: Pardee v. Glass, 11 O. R. 275; Burling v. Harley, 3 H. & N. 271; Dale

v. Cool, 4 C. P. 460; also in an action for excessive seizure, and exacting more than he is entitled to: Pearson v. Ruttan, 15 C. P. 79.

Where the act has not been done in the capacity of officer, but is wholly diverso intuitu, notice is not required, as where goods not liable to seizure are seized as forfeited, and money is taken to release them, in an action to recover such money no notice is requisite: Irving v. Wilson. 4 T. R. 485; 2 R. R. 444; so where an unlawful fee is taken for doing or omitting to do something if the fee could not be taken in the character of officer, no notice is requisite: Morgan v. Palmer. 2 B. & C. 729.

If a seizure is made for two causes, as to one only of which the officer is entitled to notice of action, he is nevertheless liable in trespass as to the other, without notice: Lamont v. Southall, 5 M. & W. 416. No notice is required to recover an excess of money made under execution: Dale v. Cool, 6 C. P. 544; McLeish v. Howard, 3 A. R. 503.

If a person is not duly appointed a bailiff, he is not entitled to notice of action: Tarrant v. Baker, 14 C. B. 199.

A party who sets proceedings in motion is not entitled to notice of action; it is only intended to protect officers who carry them out: Palk v. Kenney, 11 U. C. R. 350; Dollery v. Whaley, 8 U. C. L. J. 239; but see Gayton v. Bayman, 1 F. & F. 675.

Notice of action is not required in the following actions: Replevin: Fletcher v. Wilkins, 6 East, 293; Lewis v. Teal, 32 U. C. R. 108; Applegarth v. Graham, 7 C. P. 171; Kennedy v. Hall, 7 C. P. 218: Folger v. Minton, 10 U. C. R. 423; Gay v. Matthews, 4 B. & S. 425; but see 1b-bottson v. Henry, 8 O. R. 625; where the principal object of the action is an injunction; Flower v. Local Board of Low Leyton, 5 Ch. D. 347; Chapman v. Guardians of Auckland Union, 23 Q. B. D. 294; an action in rem: The Longford, 14 P. D. 34; an action to recover land: Foat v. Mayor of Margate, 11 Q. B. D. 299; see also illustrating the points above noted; Jolliffe v. Wallasey Local Board, L. R. 9 C. P. 62; Griffith v. Taylor, 2 C. P. D. 194; Smith v. West Derby Board, 3 C. P. D. 423; Davis v. Moore, 4 U. C. R. 209; Dale v. Cool, 4 C. P. 460; Anderson v. Grace, 17 U. C. R. 96; Ross v. McLay, 40 U. C. R. 88, 87; Joule v. Taylor, 7 Ex. 58; Pryce v Hole, 6 T. L. R. 195; Rochfort v. Rynd, 8 L. R. Ir. 204; O'Dea v. Hickman, 18 L. R. Ir. 233. The notice of action is a condition precedent to the right of suing: Clarkson v. Musgrave, 9 Q. B. D.

The want of notice must be raised at the trial: Moran v. Palmer, 13 C. P. 450, 528; and in the High Court and County Courts by the statement of defence: Verratt v. McAulay, 5 O. R. 313; McKay v. Cummings, 6 O. R. 400.

In the Division Courts notice of the statutory defense should be given six days before the trial under section 128: Smith v. Pritchard, 2 C. & K. 699; Allwright v. Perks, 9 T. L. R. 235: but it has been questioned whether the section applies to actions brought in Division Courts.

Within six months.—The day of doing the act must be excluded: Young v. Higgon, 6 M. & W. 49; Hanns v. Johnston, 8 O. R. 100; Re Gallant, 11 C. L. T. 188; Hardy v. Ryle, 9 B. & C. 603; Edgar v. Magee, 1 O. R. 287.

Yenue.—The action must be laid and tried in the county where the fact was committed. But, under section 89, it may be tried in the division the place of sitting of which is nearest to the residence of the clerk or bailiff, though in another county: Partridge v. Elkington, L. R. 6 Q. B. 82.

And of the cause thereof.—The plaintiff will be confined to the cause mentioned in the notice: Cherrier v. Robertson, 14 P. R. 553. It need

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ed to the cause 553. It need not state the form of action: Prickett v. Gratrex, 8 Q. B. 1020; nor whose goods were seized, nor the amount of damages: Barton v. De Gros, 11 L. T. N. S. 270.

Section 290

The notice must state the time and place of trespass complained of; Moore v. Gidley, 32 U. C. R. 233; Oliphant v. Leslie, 24 U. C. R. 398: Martins v. Upoher, 3 Q. B. 662; but a mistake as to the locality, not calculated to deceive, will not vitiate it: Mason v. Kensington Vestry, (1892), 1 Q. B. 614.

The notice need not have the name, etc., of the plaintiff or his solicitor indorsed: McPhatter v. Leslie, 23 U. C. R. 573.

In an action against a bailiff for seizing goods exempt, it was held that it was not necessary to endorse on the notice of action the name and abode of the plaintiff: McMartin v. Hurlburt, 2 A. R. 146, and that a compliance with this section, and not with chapter 73 of the revised statutes is all that is required: Ib.; see also Stephens v. Stapleton, 40 U. C. R. 353.

It is not necessary to state in what court or in what division of the High Court the action will be brought: Hanns v. Johnston, 3 O. R. 100; but if a court is mentioned, the writ must be issued from that court: Buck v. Hunter, 20 U. C. R. 436.

It is not necessary that the notice be in one document; it may be contained in a series of letters if in the result the cause of action and the other particulars required are disclosed: Lamley v. Mayor of East Retford, 55 J. P. 133; see Cox v. Hamilton Sewer Pipe Co., 14 O. R. 300.

A reference to a statute which does not apply will not invalidate the notice; if it give notice of the action and the cause thereof, it is sufficient: Macgregor v. Galsworthy, 3 C. & K. 8.

Where the notice of action stated that one month after service of the notice an action would be brought, etc., and for malicious, etc., destruction of goods and for damages for loss of time and injury to business, and for the recovery of costs and expenses, etc., "the same having been committed by you against me in the month of May last at the village of M. and at the town of P.," and the notice was served on one of the defendants personally and on the agent of the other defendant at M., and a copy was also left for him at his place of residence at P. and another copy served on his solicitors, and this defendant also admitted that he had seen the notice though it was not shewn at what time or place he had seen it: Held, that the notice and service were sufficient: Bond v. Conme, 16 A. R. 398; see Jones v. Grace, 17 O. R. 681.

The notice should be signed by the plaintiff or his attorney and give the residence or place of business of one of them: Kemble v. McGarry, 6 O. S. 570; Bates v. Walsh, 6 U. C. R. 498.

The defendant may waive a defect in the notice: Donaldson v. Haley, 13 C. P. 87.

Reasonable certainty only is required, so as to identify the acts complained of, and prevent defendant being misled: Langford v. Kirkpatrick, 2 A. R. 513.

A notice given in the name of a party who is dead at the time of service thereof, is insufficient; Pilkington v. Riley, 3 Ex. 789.

For form of notice, see Forms.

Service of notice.—The service need not be personal; leaving it with the officer's wife at his dwelling house was held sufficient: Hanns v. Johnston, 3 O. R. 100. The notice need not be served by the party, his attorney or agent in person, but may be served by any other literate person; for instance, the attorney's clerk: Cuming v. Toms, 7 M. & G. 29.

D.C.A.-25

Sections 290-292

One month at least. - Notice of the action was given on the 28th April and the action commenced on 29th May, following; held sufficient: Freeman v. Read, 4 B. & S. 174. There must be an interval of at least one month, the day of service and the last day of the month both being excluded: Re Railway Sleeper's Supply Co., 29 Ch. D. 208; Radcliffe v. Bartholomew, (1892), 1 Q. B. 161; Dempsey v. Dougherty, 7 U. C. R. 313; Young v. Higgon, 6 M. & W. 49.

Defendant may tender amends the general

291. If tender of sufficient amends is made before action brought, or if the defendant, after action brought, and plead pays a sufficient sum of money into court with costs, the issue, etc. plaintiff shall not recover, and in such action the defendant may plead not guilty, and give any special matter in evidence under that plea. R. S. O. 1877, c. 47, s. 232. See also Cap. 73.

> Sufficient amends.—A tender of amends will not cure a defect in the the notice of action: Martins v. Upcher, 3 Q. B. 662.

> If a tender of sufficient amends is made before action, it need not be pleaded; neither need the amount be paid into court: Jones v. Gooday, 9 M. & W. 736.

> If the tender should be pleaded, the plaintiff should reply that the defendant did not tender, or that the sum was insufficient, and not that the defendant did not tender sufficient amends: Williams v. Price, 3 B. & Ad. 695.

> The effect of not pleading the tender and paying money into court will be to prevent the defendant from giving evidence of it. But whether pleaded or not, if the verdict of the jury should be less than the amount tendered, the plaintiff "shall not recover": Jones v. Gooday, 9 M. &. W.

> If no tender is made the defendant may pay a sum into court, but it is necessary that costs be also paid in; see section 125, ante p. 176.

If the money paid in is sufficient, the plaintiff "shall not recover." As to what is a sufficient tender, see notes to sections 122-127.

Not Guilty—A plea of not guilty under section 288, entitles a defendant to "avail himself of the matters of defence herein given." This section gives to such plea a wider effect. The cases applicable to such plea will be found noted under section 288.

Plaintiff not to have costs where over ten dollars without

292. In case an action is brought in any Court of Record in respect of any grievances committed by any clerk, verdict not bailiff or officer of a Division Court, under colour or pretence of the process of such court, and the jury upon the certificate. trial find no greater damages for the plaintiff than \$10, the plaintiff shall not have costs unless the Judge certifies in writing that the action was fit to be brought in such Court of Record. R. S. O. 1877, c. 47, s. 233.

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Grievances committed by any clerk, etc.—This section only applies Sections to "officers" of the courts: Palk v. Kenney, 11 U. C. R. 350; Dollery v. 292-294 Whaley, 8 U. C. L. J. 239.

Under colour or pretence of the process.—This, perhaps, means practically the same as intending or professing to act in the execution of his duty as clerk, bailiff or officer under process of the court.

Shall not have costs.—It is to be observed that the section only applies to actions brought in Courts of Record: see section 7, and notes thereto.

The plaintiff recovers no costs whatever without the certificate. In other cases he would be entitled to costs according to the court in which the action might have been brought: C. R. 1174, and if tried by a jury, the defendant would have a right of set-off: C. R. 1172; Bennett v. White, 13 P. R. 149; Truax v. Dixon, 13 P. R. 279.

Action was fit to be brought in such court.—It is submitted that this means an action in which the jury may think proper to give not more than \$10 damages, although the evidence would have warranted a larger sum, for which the plaintiff reasonably made claim, or one in which the point involved is of general importance.

The fact that the plaintiff may recover more than \$10 will not entitle him to full costs. He will still be subject to C. R. 1172 and 1174; McNair v. Boyd, 14 P. R. 132; Baskerville v. Vose, 15 P. R. 122.

DISPOSAL OF FINES.

293. The moneys arising from any penalty, forfeiture Fines, how or fine imposed by this Act, not directed to be otherwise of. applied, shall be paid to the clerk of the court which imposed the same, and shall be paid by him to the County Crown Attorney of the county to be by him paid over to the Provincial Treasurer, and shall form part of the Consolidated Revenue Fund. R. S. O. 1877, c. 47, s. 234.

Arising from any penalty.—See sections 133, 162, 165, 275, 276. An action would lie against the clerk's sureties for non-payment.

DISPOSAL OF MONEYS PAID INTO COURT.

294. The clerk of every Division Court shall, immedi-Clerk to ately after the receipt of any sum of money whatever for of payment of money. any party to an action, forward, through the post office, to the party entitled to receive the same, a notice, enclosed in an envelope addressed to such party or in the case of a transcript of judgment from another court, then to the clerk who issued the same, at his proper post office address, informing him of the receipt of the money; the notice thus sent shall be prepaid and registered, and the clerk shall obtain, and file among the papers in the action the post

Sections 294-295

office certificate of the registration, and shall deduct the postage and charge for registration from the moneys in his hands, but he shall charge no fee for the notice; the absence from among the papers in the action of the certificate of registration shall be *prima facie* evidence against the clerk that the notice has not been forwarded. 43 V. c. 8, s. 56.

Immediately after the receipt of any sum of money.—The words "shall immediately" here used, denote both an imperative and peremptory command. They imply "prompt, vigorous action, without any delay:" see notes to section 20, ante p. 16.

It will be observed that the words here employed are "any sum of money whatever." Whether the sum be large or small, the notice is required to be given by the clerk. The party entitled to the notice could, of course, waive the giving of it; but, in order to justify a clerk in omitting to give it, he should, for his own protection, take the waiver in writing. Should the inspector find that such notice had not been given in any case where not dispensed with, he would probably reprimand the officer, and if such practices became general, it would be his duty to report such conduct to the Government, under section 61 of this Act, for their action upon it.

The remissness of many clerks throughout the country has rendered this and many other provisions of the present Act necessary. The omission on the part of some clerks to advise parties when moneys are paid into court on their suits was under the law formerly a frequent source of trouble and complaint. Should the provisions of this section be disregarded, the executive has, under section 30, the power to exercise a summary remedy.

No particular form of notice is necessary, provided it gives to the person entitled to it the necessary information. The failure to give the notice subjects the clerk to the loss of his office.

It may be in the following form or to the like effect:

In the Division Court for the County of A. B., Plaintiff v. C. D., Defendant. Take notice that the sum of \$ has this day been paid into court to your credit in this cause.

Dated this day of , 189 , Clerk.

To A. B., the plaintiff (or as the case may be).

The clerk should obtain the address of the parties to a suit so that he may know where to direct the notice.

Transcript of judgment from another court.—See section 218 and notes thereto. The clerk is not bound to transmit money by post except on the request and at the expense of the party entitled thereto; and in the absence of such request, it is payable at the clerk's office.

Where a transcript is issued the clerk of the foreign court must not transmit the money to the clerk of the home court without the plaintiff's written order.

Unclaimed moneys to be paid over to County Crown Attorney. 295. All sums of money which have been paid into court to the use of any party, and which have remained unclaimed for the period of six years after the same were paid into court or to the officers thereof, and all sums of

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paid into remained ame were ll sums of money when this Act takes effect or afterwards in the hands of the clerk or bailiff, paid into court, or to the officers thereof, to the use of any suitor shall, if unclaimed for the period of six years after the the same were so paid, form part of the Consolidated Revenue Fund, and be paid ever by the clerk or officer holding the same to the County Crown Attorney of his county, to be by him paid over to the Treasurer of the Province, and no person shall be entitled to claim any sum which has remained unclaimed for six years. R. S. O. 1877, c. 47, s. 235.

Unclaimed for the period of six years.—See section 49. This is virtually a Statute of Limitation upon the rights of the party to whose use the money was paid in: see Williamson v. McCrary, 33 Ark. 470.

But we submit that the forfeiture here declared can only come into operation where the party entitled has either notice of it under the next preceding section, or otherwise. It might be that a clerk would fail to give notice of the money having been paid in, or he might deny that he received it, so that we think, under these circumstances, it would not be "unclaimed" money within the meaning of this section: Gibbs v. Guild, 9 Q. B. D. 59.

We cannot see that the wrong of another should operate as a confiscation of the property of an innocent party: see Atty.-Gen. v. O'Reilly, 6 A. R. 576.

In this view the six years would only commence to run when the party entitled knew, or should but for his own neglect have known, that it was in court for him.

296. No time during which the person entitled to claim Claims of such sum was an infant or of unsound mind, or out of the persons Province, shall be taken into account in estimating the six not to be years. R. S. O. 1877 c. 47, s. 236.

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The time would cease to run while any of these disabilities continued: contrast Penny v. Brice, 18 C. B. N. S. 393.

The section is very different from R. S. O. c. 60, s. 3.

GENERAL RULES AND ORDERS.

297. The existing Board of County Judges with Board of authority to make rules relating to Division Courts shall their continue until superseded or revoked by the Lieutenant-to frame rules con-Governor; and all Rules and Forms heretofore made relating tinued. to Division Courts and in force when this Act takes effect

shall, so far as applicable, remain in force until otherwise ordered under the provisions of this Act. R. S. O. 1877, c. 47, s. 237.

In England a complete set of rules was issued in 1886, another in 1889, and they are being constantly improved upon, a number of new rules having come into force there as late as October 1st, 1892. Rules with reference to counter-claims, receivers, injunctions, replevin, claims for contribution or indemnity by third parties, partners, married women and enforcement of orders by attachment are much needed in this province, and the full extent of the powers of Division Courts will not be seen until such rules are promulgated.

The section providing that the old rules are to continue in force was probably unnecessary, for notwithstanding the formal repeal of the Acts under which they were made, the revision really preserves them in unbroken continuity: License Commissioners of Frontenac v. County of Frontenac, 14 O. R. 741.

The Lieutenant-Governor may appoint five County Judges to frame rules, etc.

298. (1) The Lieutenant-Governor may from time to time appoint and authorize five of the County Judges, who shall be styled "The Board of County Judges," to frame General Rules and Forms concerning the practice and proceedings of the Division Courts, and the execution of the process of such courts, with power also to frame rules and orders in relation to the provisions of this Act, or of any future Act respecting such courts, as to which doubts have arisen or may arise, or as to which there have been or may be conflicting decisions in any of such courts.

Retired Judge may

(2) The Lieutenant-Governor may appoint any retired be appoint County Judge to be one of the members of the Board.

Rules respecting Clerks and Bailiffs.

(3) The board may also from time to time make Rules for the guidance of clerks and bailiffs, and in relation to the duties and services to be performed, and to the fees to be received by them; and may also substitute other fees in lieu of fees payable to clerks and bailiffs under any rule, order or statute.

Amendment of rules.

(4) The Board may from time to time alter or amend any rules or orders made for the Division Courts, and may for any Division Court Division, embracing a city or part of a city, establish a lower tariff of fees from that established for County Division Courts. R. S. O. 1877, c. 47, s. 238.

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or amend and may y or part at estab-377, c. 47, Scope of Board's power.—The authority given by this section to the Board of County Judges is very extensive. Indeed it may be said to comprise the whole domain of adjective law as distinguished from substantive law. All questions of the procedure by which legal or equitable rights may be enforced or extinguished may be dealt with. The word "practice" in the section, "denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer the machinery as distinguished from its product," per Lush, L.J., Poyser v. Minors, 7 Q. B. D. at p. 333. The board would have full power to pass a rule declaring that a non-suit should have the same effect as a judgment upon the merits, for the defendant: Poyser v. Minors, 7 Q. B. D. 329.

The further power is given to the board to interpret any doubtful enactment respecting Division Courts, and their interpretation, when approved under section 300, is binding: see section 301. They also have power to declare which one of the conflicting decisions shall be followed.

But they have no power to pass a rule altering their jurisdiction in direct contradiction to the terms of the Act. Nor have they power to delegate to the clerks the jurisdiction conferred on the Judges: Fellows v. Owners of The "Lord Stanley," (1893), 1 Q. B. 98. Nor have they power to pass a rule repugnant to the provisions of this Act: Irving v. Askew, L. R. 5 Q. B. 208, per Hannen, J., at p. 211; see also Weatherfield v. Nelson, L. R. 4 C. P. 571; R. v. Pawlett, L. R. 8 Q. B. 491.

Retired Judge.—A retired county Judge is a person who has filled the office of Judge of a county court, and who at his own request has been relieved from the discharge of his duty, in contradistinction to one who has against his will been dismissed.

He may resume legal practice, embark in commercial ventures, take Holy Orders or enter Parliament, without losing his status as a retired Judge: Macdonell v. Blake, 17 A. R. 312.

Regulating Clerks and Bailiffs —The board has no judicial functions nor disciplinary power over clerks or bailiffs. Its functions are legislative. It has full power to make rules for the guidance of clerks and bailiffs, which rules have the same force, after approval, as a statutory enactment, and the non-compliance with which would render the officer liable to punishment under sections 29 or 30: McKenzie v. Ryan, 6 P. R. 323.

The legislature and the board have full control over the fees of officers. The board may even substitute fees fixed by themselves for fees fixed by a statute; in other words, they may virtually repeal a statute.

The board has the most ample powers of altering and amending rules from time to time, and, as there is no fixed date of sitting, a rule may be altered or abrogated, or a new rule made at any time when the necessity for it appears.

The delay which would be necessary if the legislature had not delegated these powers may, therefore, be avoided.

The board also has power to discriminate against city Division Courts in the matter of fees.

The authority of the legislature to delegate these powers is clear: R. v. Burah, 3 App. Cas. 889; Hodge v. Regina, 9 App. Cas. 117; Powell v. Apollo Candle Co., 10 App. Cas. 282. "Such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail: "9 App. Cas. at p. 132.

Sections 299-302

Board to certify rules to the High Court to be

299. The Board of County Judges or any three of them shall, under their hands, certify to the President of the High Court all Rules and Forms made after this Acttakes effect, and the said President shall submit the same laid before to the Judges of the High Court, or to any four of them. R. S. O. 1877, c. 47, s. 239.

> The legislation of the board must be certified to the President of the High Court of Justice, i.e., that one of the Presidents of the three divisions of that court who is first in order of seniority: R. S. O. c. 44, s. 3, g-s. 10.

> At least three of the board must certify the rules and forms framed by them, and at least four Judges of the High Court must approve of them.

> Upon approval, they govern all future procedure and apply equally to pending actions and those commenced after their adoption: Re McKay v. Martin, 21 O. R. 104; Wright v. Hale, 6 H. & N. 227; Kimbray v. Draper, L. R. 3 Q. B. 160.

> "No person who sues or is sued on a cause of action which existed before the enactment as to procedure, has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect and, therefore, has altered:" per Bowen, L.J., Turnbull v. Forman, 15 Q. B. D. 238.

Such rules to be approved of by the Judges;

300. The Judges of the High Court (of whom the President of one of the Divisions shall be one) may approve of, disallow, or amend any such Rules or Forms. R. S. O. 1877, c. 47, s. 240.

The Judges of the High Court have more than a power of assenting or dissenting. They may amend any rule or form framed by the Board.

And have force of a statute.

301. The Rules and Forms so approved of shall have the same force and effect as if they had been made and included in this Act. R. S. O. 1877, c. 47, s. 241.

The rules and forms have no force till approved. After approval they have the same effect as if enacted by the legislature.

Judges to transmit copies to the Lt.-Governor. etc.

302. The Judges who make any Rules and Forms. approved of as aforesaid shall forward copies thereof to the Lieutenant-Governor, and the Lieutenant-Governor shall lay the same before the Legislative Assembly. R. S. O. 1877, c. 47, s. 242.

The statute is somewhat defective in not providing for a proper promulgation of the rules. The board is merely required to forward copies. of its rules and forms to the Lieutenant Governor. Nothing further need be done by them, and the Lieutenant-Governor's duty ends when he lays the copies received by him before the Legislative Assembly.

That body cannot give effect to the rules, nor can it alter them or prevent their immediate operation. It can only, as one branch of the legislature, pass a bill for effecting any one of these objects, which bill would three of esident of r this Act the same r of them.

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Some provision should be adopted for proper publication of the rules. At present it is almost if not quite impossible to verify the correctness of any rule for want of any known place where an official copy can be found.

The Interpretation Act enacts: "Where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them: 'R. S. O. c. 1, s. 8, s-s. 35; Jones v. Grace, 17 O. R. 681.

303. The Lieutenant-Governor may, by warrant, direct the Provincial Treasurer to pay, out of the Consolidated Revenue Fund, the contingent expenses connected with the framing, approval and printing of such Rules. R. S. O. 1877, c. 47, s. 243.

304. In any case not expressly provided for by this Expenses Act or by existing Rules, or by Rules made under this Act, for the County Judges may, in their discretion, adopt and apply the general principles of practice in the High Court to actions and proceedings in the Division Courts; provided that nothing herein contained shall be held to authorize the Practice of taxation or allowance of costs to any officer of the court, Court may other than those to be found in the taxiff of fees as author other than those to be found in the tariff of fees as author-in unproized and allowed by the Board of County Judges, under the provisions of this or any other Act. R. S. O. 1877 c. 47, s. 244; 45 V. c. 7. s. 7.

It is only in cases not expressly provided for in the statute or rules that the ordges may apply the general principles of practice of the High Court: Clarke v. Macdonald, 4 O. R. 310. And only the general principles of practice may be so applied.

Statutory enactments conferring powers upon or prescribing particular precedure for the High Court, cannot be extended under this section to Division Courts. For instance, the provisions of the Consolidated Rules as to service upon corporations are not applicable to Division Courts: Ahrens v. McGilligat, 23 C. P. 171; Re Guy v. G. T. Ry. Co., 10 P. R. 372. Nor are the provisions as to discovery by examination and production of documents; Re Willing v. Elliott, 37 U. C. R. 220.

Those rules are rules of procedure applying only to the courts to which they are in terms made applicable: Bank of Ottawa v. McLaughlin,

But general principles of practice may be applied, e.g., the Judges may exercise the same discretionary power as to allowing parties to sue in forma pauperis which the Judges of the High Court exercise: Chinn v. Bullen, 8 C. B. 447.

In the High Court the granting or refusing of security for costs is purely discretionary and a matter of practice and not a rule of law or a decided right: per Cameron, J., Re Fletcher v. Noble, 9 P.R. 257; and a

Division Court Judge may, therefore, adopt the principles of the High Court and order security for costs in proper cases: Ib.

The section will also authorize the appointment of a stranger to execute a warrant of execution or commitment against a bailiff, issued out of his own court, notwithstanding that the appointment of bailiffs is by section 27, vested in the Lieutenant-Governor.

This is analogous to the appointment of clisors in the High Court where a sheriff and coroner are interested: Bellamy v. Floyle, L. R. 10 Ex. 220; see notes to section 279.

The principles of practice of the High Court, as to amendments may be applied to the Division Courts: Re White v. Galbraith, 12 P. R. 513.

Perhaps a Judge of a Division Court would have power to order a married woman, against whom a judgment had been recovered, to appear and be examined for the purpose of discovering the particulars of her separate estate. This could be done, perhaps, under the inherent power of the court to enforce its own judgments, if not by judgment summons: see Rule 47, Order 25, of the English County Court Rules of 1892: Aylesford v. Great Western Ry. Co., 8 T. L. R. 786; (1892), 2 Q. B. 626: Metropolitan Loan & Savings Co. v. Mara, 8 P. R. 355; Pearson v. Essery, 12 P. R. 466; but see McLeod v. Emigh, 12 P. R. 466.

It is now settled that a judgment against a married woman is personal and not merely proprietary: Pelton v. Harrison, (1892), 1 Q. B. 118.

The powers conferred upon Judges, under the Judicature Act, of setting aside verdicts of juries and entering judgments are not applicable to Division Courts: Pryor v. City Offices Co., 10 Q. B. D. 504; see also Cowan v. McQuade, 19 C. L. T. 108; Macnee v. Ontario Bank, 3 C. L. T. 360; Building & Loan Assn. v. Heimrod, 3 C. L. T. 361; "High Court Practice in Inferior Courts," 3 C. L. T. 374.

CLAIMS BY AND AGAINST MARPIED WOMEN.

Married women are probably more frequently to be found as litigants in the Division Court than in any of the higher courts.

Claims by and against them are to be dealt with and disposed of upon the same grounds and, therefore, in somewhat the same manner in all courts.

Right to sue and be sued.—Since the 1st July, 1884, a married women has been capable of suing and being sued in all respects as if she were a feme sole,—i.e., unmarried—and her husband has not been a necessary party either as plaintiff or defendant. Even for a tort committed before that Act was passed, a married woman is entitled to sue alone: Weldon v. Winslow, 13 Q. B. D. 784; Severance v. Civil Service Supply Assn., 48 L. T. N. S. 485: James v. Barraud, 49 L. T. N. S. 300.

She may be sued by her husband for loans made by him to her after, but not before marriage: Butler v. Butler, 14 Q. B. D. 838.

The liability of a married woman in contract depends upon whether the contract was made with respect to, and with the intention of binding separate property actually possessed by her at the time of entering into the contract: Re Shakespeare. Deakin v. Lakin, 30 Ch. D. 169; Palliser v. Gurney, 19 Q. B. D. 519; Stogdon v. Lee, (1891), 1 Q. B. 661; Moore v. Jackson, 16 A. R. 431.

Unless the separate property exists, the married woman is not bound by the contract. And the separate property must be free from any restraint on anticipation: Whittaker v. Kershaw, 45 Ch. D. 320; Braunstein v. Lewis, 64 L. T. N. S. 265; 65 L. T. N. S. 449; Harrison v. Harrison, 13 P. D. 180.

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n is not bound e from any re-). 320; Braunarrison v. HarThe liability in tort depends upon whether the wrongful act was the voluntary act of the married woman, or whether she was acting in the company and under the compulsion of her husband: Schouler on Husband and Wife, ss. 133-135; Lee v. Hopkins, 20 O. R. 666; Seroka v. Kattenburg, 17 Q. B. D. 177; or whether she has allowed her separate property to be used so as to impose a liability on her as owner thereof: Shaw v. McCreary, 19 O. R. 39.

The sole undertaking of a married woman as to damages on obtaining an injunction by her to restrain interference with property claimed by her must be accepted: Re Prynne, 53 L. T. N. S. 465; and though the injunction may be obtained against her husband, he may enforce the undertaking, notwith-tanding his disability to sue her for tort: Hunt v. Hunt, 54 L. J. Ch. 289.

Should allege separate estate.—In Moore v. Jackson, 16 A. R. 431, at p. 436, it was said that in an action of contract against a married woman, it was necessary to allege and prove separate estate. Whether any such allegation is necessary in Division Courts, where no pleadings are required is a moot point. The stutute merely requires a copy of the plaintiff's account, claim or demand in writing in detail (sections 94 and 109), and this would be satisfied without any allegation of separate estate.

The onus of proving an enforceable contract is upon the plaintiff, and his evidence must necessarily shew separate estate, or he will fail in his action: Field v. McArthur, 27 C. P. 15; Darling v. Rice, 1 A. R. 43; Palliser v. Gurney, 19 Q. B. D. 519; Stogdon v. Lee (1891), 1 Q. B. 661. It is, however, recommended that in all cases of contract an allegation be made that at the time of making the contract, the defendant possessed separate estate and contracted with reference thereto. Such an allegation will entitle the plaintiff, in the case of a special summons, to judgment by default: Tetley v. Griffith, 57 L. T. N. S. 673; Holtby v. Hodgson, 24 Q. B. D. 103, at p. 105; see 27 L. J. N. S. 32.

A charge upon her separate estate is sufficient evidence of its existence to entitle a plaintiff, with whom she has contracted, to an enquiry: London Discount Alliance Co. v. Kerr, 1 C. & E. 5; but see Bell v. Riddell, 2 O. R. 25.

It is not necessary to either allege or prove separate estate when suing a married woman for a debt contracted by her while a feme sole: Downe v. Fletcher, 21 Q. B. D. 11. Neither is it necessary in an action for tort: Barker v. Westover, 5 O. R. 116.

The omission to prove separate estate, when necessary, does not give a right to prohibition: Re Widmeyer v. McMahon, 32 C. P. 187.

It is not necessary to prove separate estate at the date of the judgment: Downe v. Fletcher, 21 Q. B. D. 11.

Presumption that separate estate bound.—By R. S. O. c. 132, s. 3, s-s. 3, it is enacted that "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary is shewn."

The rule prior to this statute was laid down in Lawson v. Laidlaw, 3 A. R. 77, at page 90, in substantially the same terms, and the section cannot be said, in view of the decisions thereon, to be more than declaratory of the law; see cases cited, 1 White & Tudor's L. C. 570, 571.

In Horner v. Kerr, 6 A. R. 30, Burton, J.A., doubted whether a married woman would be liable upon a joint contract, but Hulme v. Tenant, 1 Bro. C. C. 15; 2 Dick. 560; 1 White & Tudor's L. C. 536, which is the leading case upon the subject of a married woman's liability,

expressly decided this point in the affirmative; and the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, applies to such a contract: Hoare v. Niblett, (1891), 1 Q. B. 781.

The equity which is imposed on a purchaser to pay off mortgages on the purchased estate, is not a contract, and a married woman who made such a purchase would not be liable for non-payment of the mortgages; McMichaet v. Wilkie, 18 A. R. 464; and the same principle is applicable to claims against her for moneys received, and to which she believed herself entitled, for no implied assumpsit will be raised against her contrary to the intention of the parties: Boiton v. Williams, 2 Ves. Jr. 138; Jones v. Harris, 9 Ves. Jr. 486; 7 R. R. 282; Wright v. Chard, 4 Drew. 673, but a married woman who alienates property devised to her is liable for the debts of the testator to the extent of the value of the property; Re Hedgely. Small v. Hedgely, 34 Ch. D. 379.

A solicitor acting for a wife must obtain her express contract to pay the costs: Callow v. Howle, 1 DeG. & Sm. 531. If retained by the husband and wife, though in respect to the separate estate, in the absence of a special contract, the husband will be liable: Wright v. Chard, 4 Drew. 702.

Unless the contrary be shown,—i.e., unless the separate property be of such a nature that the presumption cannot arise: Bonner v. Lyon, 38 W. R. 541.

The fact that a married woman has separate estate at the time of entering into a contract is not conclusive. She may have contracted as agent of her husband, or of some other person, or in some capacity or under such circumstances as shew that she did not intend to bind her separate estate. Or the separate estate may be of such a nature as will not justify the inference that she intended to contract with reference to it in entering into the particular contract. Or she may be restrained from anticipating such separate property. A woman who lives with her husband and family, and who orders household supplies or provisions in the ordinary way, as managing the household, is not by the mere fact of possessing separate estate deemed to have contracted with reference thereto: Griffin v. Patterson, 45 U. C. R. 536. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself in respect of her separate estate, that separate estate will be liable to satisfy the obligation: Matthewman's Case, L. R. 3 Eq. 787.

Where a married woman had an income of £107 per annum which she was restrained from anticipating, and had arranged with her husband that she should clothe herself and children thereout, and she possessed no other property but her own and the children's clothes, it was held that she was not liable for clothes purchased by her, as it would be absurd to assume an intention to enter into a contract with respect to property she could not do without: Leak v. Driffield, 24 Q. B. D. 102. Where, however, the only separate estate was jewelry, etc., previously supplied by plaintiffs, the married woman was held liable: Bonner v. Lyon, 38 W. R. 541.

After income which a married woman is restrained from anticipating is paid over to her, it becomes her free separate property and while it remains in her possession she may contract with reference thereto. It is therefore necessary for a plaintiff in such a case, if the defendant has no other separate property to prove that at the time of the contract the married woman had unspent income in arrear: Fitzgibbon v. Blake, 3 Ir. Ch. Rep. 328, 330; Myles v. Burton, 14 L. R. Ir. 258; or in her hands to such an amount as to justify the inference that she intended to bind such: Everitt v. Paxton, 65 L. T. N. S. 283; 7 T. L. R. 465.

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The question is one of fact to ascertain whether the separate property is such as she could and might reasonably have contracted credit upon: Sweetland v. Neville, 21 O. R. 412.

What is separate estate.—Separate estate is real or personal property held by a married woman, free from all marital rights of the husband, and over which he has no control or right of interference or disposition, but which she can, subject to any restraint against anticipation which may be imposed, dispose of in the same manner as if unmarried.

The separate use is an incident of and lasts only during coverture: Re Lambert's Estate. Stanton v. Lambert, 39 Ch. D. 626. While discovert the property is not separate estate; Myles v. Burton, 14 L. R. Ir. 258.

Land which is separate estate —(1) Real estate held by a married woman, or by trustees for her, for her separate use in fee: Taylor v. Meads, 4 DeG. J. & S. 597, 607; or in tail: Cooper v. Macdonald, 7 Ch. D. 288; or any less estate; or under an agreement before marriage that all property acquired should be separate: Sanders v. Malsburg, 1 O. R. 178.

If the husband should build upon it the wife would have the benefit of his outlay: Barrack v. McCullough, 3 K. & J. 119; Grant v. Grant, 34 Beav. 623; Till v. Till, 15 O. R. 133.

(2) Real estate conveyed to a married woman for her sole use and benefit: Dame v. Slater, 21 O. R. 375.

For other words which will create a separate estate, see White & Tudor's L. C. 545; Negus v. Jones, 1 C. & E. 52.

Land conveyed by a husband to his wife for her sole use: Massy v. Rowen, L. R. 4 H. L. 297; Surman v. Wharton, (1891), 1 Q B. 491; Kent v. Kent, 19 A. R. 352; or for "her own proper use and benefit:" Surman v. Wharton, (1891), 1 Q. B. 491.

- (3) Real estate owned by a married woman married, after 2nd March, 1872, at the time of her marriage or acquired after it: R. S. O. c. 132, s. 3; Furness v. Mitchell, 3 A. R. 510; Moore v. Jackson, 19 A. R. 383;
- (4) Real estate owned by a married woman whenever married, acquired between 2nd March, 1872, and 31st December, 1877: Dingman v. Austin, 33 U. C. R. 190; see Moore v. Jackson, 19 A. R. at p. 392;
- (5) Real estate acquired by a married woman after 1st July, 1884, unless affected by a marriage settlement or agreement for a settlement: see R. S. O. c. 132, s. 20; Re Whitaker. Christian v. Whitaker, 34 Ch. D. 227:
- (6) Real estate acquired by a married woman from the savings or product of her separate estate; Horner v. Kerr, 6 A. R. 30;
- (7) Property, real or personal, over which a woman has a general power which she exercises: R. S. O. c. 132, s. 6;
- (8) Property, real or personal, over which a woman has a general power by deed or writing or by will, whether exercised or not; Johnson v. Gallagher, 3 DeG. F. & J. 494, 516; but see Re Roper. Roper v. Doncaster, 39 Ch. D. 482;
- (9) Property, real or personal, held by a married woman for life for her separate use, with remainder, as she may by deed or will appoint, with remainder, in failure of appointment to her executors: London Chartered Bank of Australia v. Lempriere, L. R. 4 P. C. 572, 595, see Re Roper. Roper v. Doncaster, 39 Ch. D. 485, 489.

Personal property which is separate estate.—(1) Personalty, acquired, given to or settled upon a married woman for her separate use, or in such other terms as would, if real estate, make it separate property according to propositions 1 and 2 supra, and personalty acquired by her from the savings or product of her separate estate: Trotter v. Chambers, 2 O. R. 515: Re Schofield and Wife, 7 T. L. R. 60 (jewellery given by husband); Re Dearmer. James v. Dearmer, 53 L. T. N. S. 905; Totten v. Bowen, 8 A. R. 602.

(2) All personal property, not comprised in a marriage settlement, whether belonging to her before marriage or in anyway acquired by her after marriage, unless such personal property had been reduced into the possession of the husband before 4th May, 1859: C.S. U. C. c. 73, ss. 1, 2; R. S. O. c. 132, s. 4; Chamberlain v. McDonald, 14 Gr. 447; Leys v. McPherson, 17 C. P. 266; Lawson v. Laidlaw, 3 A. R. 77; Dawson v. Moffatt, 13 O. R. 170; but see Balsam v. Robinson, 19 C. P. 263; McGuire v. Guire, 23 C. P. 123. Presents by a husband to a wife: Grant v. Grant, 34 Beav. 623.

Personal earnings.—Wages and personal earnings of a married woman, and proceeds or profits of a separate trade or occupation or derived from literary, scientific or artistic skill, if acquired after 2nd March, 1872: R. S. O. 1877, c. 125, s. 7; R. S. O. c. 132, s. 5, s-s. 1; Campbell v. Cole, 7 O. R. 127; McCallum v. McCallum, 8 A. R. 277; Robertson v. Laroque, 18 O. R. 469.

But quære as to such earnings acquired by a woman married before 1st July, 1884. Between 1st July, 1884, and 23rd April, 1887, during which time the personal earnings section was, as to such women, repealed: see 47 V. c. 19, ss. 3 and 22; 50 V. c. 7, s. 22.

- (3) Personalty acquired by a woman married before 1st July, 1884, her title to which, whether vested or contingent, and whether in possession, reversion or remainder accrued after that date. Her title must accrue for the first time after 1st July, 1884: R. S. O. c. 132, s. 7; Reid v. Reid, 31 Ch. D. 402; Re Hobson. Webster v. Rickards, 34 W. R. 195; Re Beaupre's Trusts, 21 L. R. Ir. 397; Re Tacker. Emmanuel v. Parfitt, 52 L. T. N. S. 923; Re Adames' Trusts, 53 L. T. N. S. 198; Re Tench's Trusts, 15 L. R. Ir. 406.
- (4) Personalty of a woman married after 1st July, 1884, whenever acquired: R. S. O. c. 132, s. 5, s.s., 2.
 - (5) See property subject to powers: Propositions 7, 8 and 9 supra.
- (6) Damages or costs recovered by a married woman in any action or proceeding brought by her: R. S. O. c. 132, s. 3, s. s. 2, and this includes damages acquired in an action brought by husband and wife for personal injuries to the wife: Beasley v. Roney, (1891), 1 Q. B. 509.
- (7) Rents received by a married woman from property not technically separate estate, but which she is entitled to, free from the control of her husband: Horner v. Kerr. 6 A. R. 30.

The husband is trustee for the wife when no other trustee is appointed: Bennett v. Davis, 2 P. Wm. 316; Rich v. Cockell, 9 Ves. 369; 7 R. R. 227; even when the marriage contract is made in a foreign country: Ex parte Sibeth. Re Sibeth, 14 Q. B. D. 417.

What is not exparate cutate.—(1) Real estate owned by a married woman at the time of her marriage when such marriage occurred prior to 2nd March, 1872, and not settled for separate use by a settlement executed by her: Dye v. Dye, 13 Q. B. D. 147: Royal Canadian Bank v. Mitchell, 14 Gr. 412.

(2) Real estate acquired after marriage and before 1st July, 1884, by a woman married before 2nd March, 1872, except: alty, acquired, use, or in such erty according her from the mbers, 2 O. R. by husband); en v. Bowen, 8

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(a) Acquired between 2nd March, 1872, and 31st December, 1877;

(b) Conveyed or settled to her sole or separate use;

(c) The product or savings of her separate estate;

(d) Acquired after 1st July, 1884: Douglas v. Hutchison, 12 A. R. 110.

(3) Personal property owned by a woman married before the 4th May, 1859, and reduced into the possession of her husband before that date.

(4) Property subject to a general power by deed or will which is not exercised or to which her heirs, executors or administrators are not entitled in default of appointment: Ex parte Gilchrist, Re Armstrong, 17 Q. B. D. 521.

(6) Alimony is not separate estate: Anderson v. Lady Hay, 7 T. L. R. 113.

Restraint on anticipation.—During coverture a married woman may be restrained from alienating or encumbering her separate property before it ought to come to her hands, this is called "rostraint upon anticipation," and no separate property subject to such restraint can be taken in execution, except that property settled by the wife herself may be taken for the wife's debts contracted before marriage notwithstanding she has restrained herself from anticipating it.

The restraint may apply to either real or personal property, and either to the income alone or to the corpus: Baggett v. Meux, 1 Phil. 627; Re Currey. Gibson v. Way (No. 1), 32 Ch. D. 361; Re Grey. Acason v. Greenwood, 34 Ch. D. 712, but it must be the accompaniment of a separate use, and a gift to separate use will not be implied from the mere existence of such restraint: Stogdon v. Lee, (1891), 1 Q. B. 661.

Where a share in a fund is directed to be paid to a married woman, after the death of a life tenant, for her separate use without power to anticipate, the restraint on anticipation is effectual only during the life of the life tenant, and on his death, the married woman is entitled to obtain payment of the fund into her own hands, and thereafter to do as she pleases with it: Re Bown, O'Halloran v. King, 27 Ch. D. 411; but if the fund is to be restrained by trustees, the restraint will still be effectual: Re Tippett's & Newbould's Contract, 37 Ch. D. 444.

After the death of the husband the separate use is at an end, and the restraint consequently falls with it; but will generally revive upon re-marriage: Tullett v. Armstrong, 4 Myl. & Cr. 377.

But during widowhood, the property cannot be taken for debts incurred during coverture: Beckett v. Tasker, 19 Q. B. D. 7; Pelton v. Harrison (1891), 2 Q. B. 422.

The restraint may be imposed by any words prohibiting alienation. As, for her "sole, separate and inalienable use": Harrison v. Harrison, 13 P. D. 180, or by words shewing that income shall not be paid to her until after it shall have become due: Field v. Evans, 15 Sim. 375: Baker v. Bradley, 7 DeG. M. & G. 597. A mere expression of wish or desire not to sell would be insufficient: Re Hutchings to Burt, 59 L. T. N. S. 490.

The words generally used are, "so that she shall not have power to dispose thereof in the way of anticipation": Prideaux on Conveyancing 14th ed. Vol. II. 273.

The court may give the married woman power to charge her separate estate, notwithstanding the restraint, but her consent is necessary: R. S. O. c. 182, s. S. It cannot remove the restraint entirely: Re Warren's Settlement, 49 L. T. N. S. 690; but may give power to raise a sum to pay debts: C.'s Settlement, 56 L. T. N. S. 299; but not if it might involve a forfeiture: Re Jordan. Kino v. Pickard, 55 L. J. Ch. 330.

Death of husband.—As the separate use ends with the coverture, property acquired on or after such death will not be separate estate, and will not be liable during widowhood for debts contracted during coverture: Re Price, Stafford v. Noble, 28 Ch. D. 709; Beckett v. Tasker, 19 Q. B. D. 7; Pelton v. Harrison (1891), 2 Q. B. 422, but, strange as it may appear, if she marry again all separate property not subject to restraint on anticipation will be liable for debts contracted during the first coverture: Jay v. Robinson, 25 Q. B. D. 467, and a restraint upon anticipation imposed only on entering into the second marriage will be ineffectual under section 20.

It is indeed doubtful whether during widowhood any property of the widow can be taken for debts incurred during coverture, although such property may have been separate during the coverture: see 8 L. Q. R. 69, 70, but see Holtby v. Hodgson, 24 Q. B. D. 108.

Death of wife.—R. S. O. c. 132, s. 22, enacts that, "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

And where the husband took the property jure mariti, he was held liable for his wife's debts to the extent of the separate estate: Surman v. Wharton (1891), 1 Q. B. 491.

The court will administer the estate for the satisfaction of debts payable thereout, just as a man's assets will be administered for the payment of his debts: Merchants Bank v. Bell, 29 Gr. 413.

Statute of Limitations.—By analogy to the Statute of Limitations, the remedy against separate estate for debts due by a married woman will be barred at the same period as debts due by a man: Re Lady Hastings, Hallett v. Hastings, 35 Ch. D. 94.

It was one time said that separate estate being a trust fund the Statute of Limitations did not bar the remedy against it: Norton v. Turvill, 2 P. Wms. 144; Hodgson v. Williamson, 15 Ch. D. 87, but now by the Trustee Act, 1891, section 13, sub-section (b) the statute runs against a married woman entitled, in possession for her separate use whether with or without restraint on anticipation.

Disputes between husband and wife.—A married woman has the same remedies for the protection and security of her own property against her husband as if such property belonged to her as a fame sole: R. S. O. c. 132, s. 14, and may obtain an injunction restraining the husband from entering a house which is her separate property: Symonds v. Hellett, 24 Ch. D. 346; Donnelly v. Donnelly, 9 O. R. 673; or may sue for trespass any person who enters the house against her will, though by the authority of the husband and unconnected with the husband's desire to live with the wife: Weldon v. DeBath, 14 Q. B. D. 339. But it is no offence for a husband to take his wife's money while they are living together, though it would be if they were fiving apart: Lemon v. Summers, 36 W. R. 351.

With these exceptions, a husband or wife cannot sue the other for a tort: R. S. O. c. 132, s. 14.

Where a wife sues a husband in contract for moneys lent out of separate estate, a distinct contract for repayment must be proved: Hopkins v. Hopkins, 7 O. R. 224; Dufresne v. Dufresne, 10 O. R. 773; Warner v. Murray, 16 S. C. R. 720; Ex parte Home. Re Home, 54 L. T. N. S. 301; Re Miller, 1 A. R. 396.

If the husband and wife living together have for a long time so dealt with the income of the wife as to show they must have agreed that it should come to the hands of the husband to be used by him, of course for

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time so dealt agreed that it , of course for their joint purposes, that would amount to evidence of a direction on her part that it should be received by him: Caton v. Rideout, 1 M. & G. 599; and would amount to a gift to the husband, and investments thereof would belong to him: Edward v. Cheyne, (No. 2), 13 App. Cas. 885. And if the income remains unspent in the husband's hands it will nevertheless be his: Beresford v. Archbishop of Armagh, 13 Sim. 643; and restraint on anticipation would make no difference: Rowley v. Unwin, 2 K. & J. 138. The onus is on the husband to prove a gift of the corpus but as to the income she must establish clearly that he received it by way of loan: Re Flamank. Wood v. Cock, 40 Ch. D. 461; Re Balke, 60 L. T. 663.

A wife is liable to her husband in respect of her separate estate for moneys borrowed after marriage but not for those borrowed before: Butler v. Butler, 16 Q. B. D. 374.

Judgment.—Any damages or costs recovered against a married woman in any action or proceeding are payable out of her separate property, and not otherwise: R. S. O. c. 132, s. 3, s-s. 2.

The form of judgment is now settled by the case of Scott v. Morley, 20 Ch. D. 120. See Forms.

The judgment is a personal judgment, but execution is limited to separate property: Perks v. Mylrea, W. N. (1884), 64; Holtby v. Hodgson, 24 Q. B. D. 103; Pelton v. Harrison, (1892), 1 Q. B. 118.

A married woman without separate estate, cannot be imprisoned for non-payment of costs: Re Clara Walter, 7 T. L. R. 445, and, even if she had separate estate, the judgment does not make her liable to penal consequences: Holtby v. Hodgson, 24 Q. B. D. 105; Re McLeod v. Emigh, 12 P. R. 450; Aylesford v. Great Western Ry. Co., 8 T. L. R. 786; (1892), 2 Q. B. 626.

A judgment for costs in an action for tort will charge all separate property which the married woman is possessed of at the date of the judgment which she is not restrained from anticipating: Cox v. Bennett, (1891), 1 Ch. 617.

A contract binds all separate property which she may acquire after making it, as well as that possessed at the time: R. S. O. c. 132, s. 3, s. s. 4; but it would seem that her liability in tort or for costs will be confined to the separate property she is possessed of at the time of bringing the action and the date of the judgment: see per Kay, L.J., Cox v. Bennet, (1891), 1 Ch. 625, but income which accrues due after the judgment, and which the married woman is restrained from anticipating, cannot be reached: Re Glanville. Ellis v. Johnson, 31 Ch. D. 532; Re Dixon. Dixon v. Smith, 35 Ch. D. 4.

By section 20 of R. S. O. c. 132, it is enacted that "no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors:" see Jay v. Robinson, 25 Q. B. D. 467; Smith v. Whitlock, 55 L. J. Q. B. 286.

Execution.—The execution must be limited to the separate estate as directed by the judgment: Nicholls v. Morgan, 16 L. R. Ir. 409.

Where property is held by trustees, the specific separate estate should be charged by an order appointing a receiver or otherwise; but where the property is held by the married woman in her own name, there is no

D. C.A. -26

reason why it may not be reached in the ordinary way, namely, by warrant of execution: Beemer v. Oliver, 10 A. R. 661.

An inquiry may be directed to ascertain of what the separate estate consists at the time of the judgment, and appointing a person to receive it until the debt and costs are paid: Re Pearce and Waller, 24 Ch. D. 405.

The plaintiff may be appointed, without security and without salary, to receive the income after payment of prior charges: McGarry v. White, 16 L. R. Ir. 322.

The defendant may be ordered to pay by instalments: Johnstone v. Browne, 18 L. R. Ir. 428; but not from income which she is restrained from anticipating: Morgan v. Eyre, 20 L. R. Ir. 541.

The Judge might, it is submitted, make an order for the examination of the married woman as to the particulars of her separate estate: Aylesford v. G. W. Ry. Co., 8 T. L. R. 786; (1892), 2 Q. B. 626; and the trustees of any settlement might be ordered to produce it: Bursill v. Tanner, 16 Q. B. D. 1.

It seems doubtful whether real estate will be sold during the life of the wife under an execution against her separate estate: Hulme v. Tennant, 1 White & Tudor's L. C. 536, 541, 542: but see Beemer v. Oliver, 10 A. R. 661.

Injunction.—A married woman cannot be restrained, before judgment, from disposing of her separate estate: Robinson v. Pickering, 16 Ch. D. 661; Merchants Bank v. Bell, 29 Gr. 413.

Security for Costs.—A married woman cannot be compelled to give security for costs, except in such cases as a man would be ordered to give such: see Re Isaac, 30 Ch. D. 418: Threfall v. Wilson, 8 P. D. 18; Severance v. C. S. S. Assn., 48 L. T. N. S. 485; Pindar v. Robinson, W. N. (1885), 147. Even though she have no separate estate and there be nothing upon which, if she fails, the defendant can take on execution. But if she sues by next friend, though unnecessarily, he may be ordered to give security for costs if not a person of substance: Re Thompson, 38 Ch. D. 317.

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during the life of : Hulme v. Tenseemer v. Oliver,

ned, before judgn v. Pickering, 16

compelled to give be ordered to give son, 8 P. D. 18; dar v. Robinson, tate and there be ake on execution. e may be ordered Re Thompson, 38

SCHEDULE.

(Section 35.)

COVENANT BY CLERK OR BAILIFF.

Know all men by these presents, that we J. B., Clerk (or Bailiff as the case may be) of the Oivision Court, in the County (or United Counties) of S. S., of , in the said County of (Esquire), and P. M., of ,

in the said County of (Gentleman), do hereby jointly and severally for ourselves, and for each of our heirs, executors and administrators, covenant and promise that J. B., Clerk (or Bailiff) of the said Division Court shall duly pay over to such person or persons entitled to the same, all such moneys as he shall receive by virtue of the said office of Clerk (or Bailiff) and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (or Bailiff) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; nevertheless it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

In witness whereof, we have to these presents set our hands and seals, this day of , in the year of Our Lord one thousand eight hundred and

Signed, sealed and delivered, in the presence of

R. S. O. 1877, c. 47, Sched.

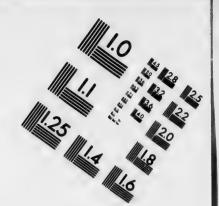
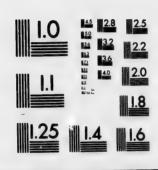


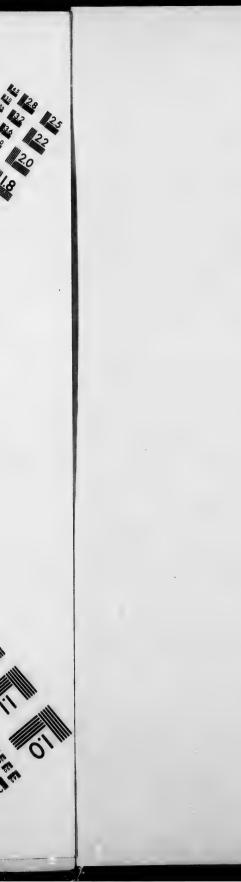
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INDEX.

A.

ABANDONMENT-

Of order of Court, what is, 120

not necessary to set aside, 120

If both parties interested in order, neither may abandon it, 175 Effect of abandoning Appeal (see Appeal), 231, 232

ABANDONMENT OF EXCESS-

Court has jurisdiction to permit, 59

When not abandoned will be prohibited only as to excess, 59

Where claim including interest exceeds \$200, excess must be abandoned, 77

May be allowed before or at the trial, 78, 106, 346

Proper form of judgment pointed out, 104

Where excess abandoned and set-off claimed exceeding \$400: 105

If claim exceeds jurisdiction, defendant entitled to judgment unless excess abandoned, 104

Claim may be reduced by credits and abandonment of excess, 105

Judgment for balance to be full discharge, 106

Form of judgment, 106

In proceedings on attachment (see Absconding Debtor), 345, 346

ABANDONMENT OF EXECUTION (see Execution)-

Effect of sale by debtor after, 297

Distinction between purchaser and subsequent execution creditor,

What is and is not abandonment, 297, 298

Effect of long delay of writ in sheriff's hands, 298

Bailiff having withdrawn may re-seize goods while writ in force,

Instructing delay until second execution, waives priority, 298. So also notifying bailiff not to proceed, 298

ABSCONDING DEBTOR-

Claims against, increased jurisdiction to apply to, 74, 78 Substitutional service upon (see Substitutional Service), 133-136 Who is, 136, 335, 337 ABSCONDING DEBTOR-Continued.

Attachment of Goods of-

Acts rendering persons liable to, 335, 337, 338

Procedure in cases of, 335

Statute respecting to be strictly construed, 336

To what cases applicable, 336

Not restricted to any particular Division Court, 339

Property liable to seizure (see Execution), 293, 337

What is attempt to remove property, 338

What acts deemed concealment to avoid service, 338

Application for-

Need not be in writing, 339

Affidavit for-

Who may make, 338

Requisites of, 338, 339

Effect of defects in, 339

How entitled, 339

To be filed with clerk, 336, 339

Filing by justice a necessary condition, 342, 343

Effect of failure of justice to transmit, 339, 342

May be taken by judge or justice, 342

Form of, prescribed, 339, 340

Warrant-

Clerk to issue, 336

And to be under his hand and seal, 336, 339

May be issued by judge or justice, 342

Requisites of, 336, 339

Procedure where issued by judge or justice, 342

No fees allowed in such cases, 342

Necessity for observance of statutory requirements, 339-343

When Attachment Superseded-

By Attachment in High Court, 340

Proceedings by sheriff, 340, 341

Procedure by creditors in such cases, 341

Execution in High Court under Creditor's Relief Act, 341

Sheriff may obtain property from bailiff, 341

Penalty against bailiff for refusing to deliver, 341

How proceeds to be distributed by sheriff, 341

Bailiff's fees to be paid by sheriff, 341

Effect of these provisions, 341, 342

Effect of Attachment, 342

Goods in custody of law cannot be seized under other process, 342

Creditor obtains lien on goods, 342

Priority over execution creditors, 342

Execution in Division Court, no priority over, 342

ABSCONDING DEBTOR-Continued.

Execution of Warrant

Bailiff or constable may execute, 336, 340

Not to be executed out of County, 304

Effect of execution out of County, 304

Fees of bailiff to be first paid, 343, 344

Bailiff or constable to seize and make inventory, 343

As to seizure (see Execution), 293, 315, 336

Property liable to seizure, 293, 315, 337, 340

Effect of excessive seizure, 340

Duties of bailiff acting under, 344

Goods to be appraised, 343, 344

Oath of appraisers, 344

Fees of appraisers, (see Fees), 44

Duties of appraisers, 344

Memo to be indorsed by bailiff on inventory, 344

Form of memo, 344

Bailiff to return inventory and appraisement to clerk, 343, 344

Return of Warrant-

To be returned forthwith to the Court, 336, 340

To what Court return to be made, 340

Proceedings-

Where commenced by attachment, 344

to be continued in Court on which attachment issued, 344,

345

proceedings commenced before attachment issued, 345

property attached may be sold under execution on judgment in the case, 345

proceeds of sale of perishable goods to be applied on judgment, 345

Replevin not maintainable by debtor, 345

but may be by third party, 345

Action of, stayed on interpleader proceedings, 345

Where process not previously served, 350, 351

Costs where attachment issued without reasonable or probable cause, 351

What deemed reasonable and probable cause, 351

Liability of creditor for attachment improperly issued, 340

Liability when executed by unauthorized person, 340

Plaintiff not to divide course of action, 345, 346

May abandon excess over \$100: 345, 346

And recover amount not exceeding \$100:345

And recover amount not exceeding wroot, or

Effect of judgment in such case, 345

Other attaching creditors may defend, 346

How claim proved, 346

When trial to be had, 346

-843

ct, 341

rocess, 342

ABSCONDING DEBTOR-Continued.

Several Attachments-

Provisions of Absconding Debtor's Act to apply, 346

How proceeds of goods to be distributed, 346, 347

When distribution to take place, 346

What creditors entitled to participate, 347

When goods insufficient to satisfy all claims, 347

How costs and expenses of clerks and bailiffs to be paid, 347

Custody of Goods ---

When seized by bailiff, 347

When seized by constable, 348

Duty of bailiff in such cases, 348

Restoration of Goods-

Terms on which restoration may be made, 248

Bond to be given to secure claims, 348

What bond sufficient, 348, 349

Condition of, 348

Liability of obligors, 349

Effect of payment of debt and costs to obtain, 349

Third party whose goods are seized entitled to indemnity from debtor, 349

Effect of payment by third party, 349

Defences to action on bond, 349

Judgment and Execution-

If defendant does not appear within one month, 350

When property may a sold thereunder, 350

Where debtor served personally execution to issue forthwith, 350

Judge cannot extend time, 350

Proceedings against debtor where process not previously served, 350, 351

Perishable Goods-

What are included in, 351, 352

May be sold on plaintiff giving security, 351

How disposed of, 352

Effect of bailiff neglecting to sell, 353

Notice of sale, 353

Effect of informality in conduct of sale, 353

Bond to be given by creditor, 353

Where bond may be sued, 354

Condition in bond, 353

Proceeds of sale, how applied, 353, 354

Setting Aside Attachment-

For defects in affidavit for, 339

If improperly issued may be set aside, 352

Claims of Landlord for Rent-

Goods seized under attachment not subject to, 865

ABSENCE OF JUDGE-

Who to preside in case of, 19

Effect of where application required to be made within specified time. 118

Adjournment of Court when Judge absent, 21

ACCOMMODATION-

Required for sittings of Courts, 7

Municipality to furnish, 7

Expense for rent, how paid, 7

Necessary accommodation defined, 7

Mandamus to compel municipality to furnish, 8

ACCOUNT-

Of fines to be kept by clerk (see Fines), 38

Of suitor's moneys to be kept (see Suitor's Money), 38

Of fines to be furnished by clerk to County Crown Attorney, 38

Of moneys received and paid out, to be furnished to Judge, 39

Action of jurisdiction of Division Courts in, 73

Entry of for suit (see Particulars of Claim), 127

ACKNOWLEDGMENT-

What required to take action out of Statutes of Limitations (see Statutes of Limitations), 182-187

ACQUIESCENCE-

In jurisdiction (see Jurisdiction), 58 Implication of agency by, 78

Action (see Causes of Action)-

Judgment may be enforced by, 4, 291

of High Court, enforceable by in Division Court, 55

costs in such cases, 4, 291

over 20 years old not enforceable, 4

Or foreign judgment, when maintainable, 4

On County Court judgment not maintainable in High Court, 5

Proceedings in, when Divisions of Court changed, 13

Against officers and sureties (see Sureties, 26-31

What is commencement of, 36

Causes of, in which Division Courts have no jurisdiction, 53

Pending in High Court, Division Court jurisdiction not ousted by,

Of trover for a deed, not suable in Division Court, 55

Where cause of arises, 109, 110

Authorities respecting, 110, 111

May be entered and tried in Court nearest defendant's residence,

114

May be sued in adjoining division by order of Judge, 115

d, 847

nnity from

hwith, 350

sly served,

ACTION-Continued.

When brought in wrong division, defendant may waive right to prohibition, 56

Of trespass to goods, within jurisdiction, 60

Of replevin (see Replevin), 79-86

On replevin bond (see Replevin Bond), 86, 354

Cause of, not to be divided (see Splitting Demands), 102

Joinder of several, depending at same time, 104

Removal of by Certiorari (see Certiorari), 106

Court trying, to have full power, 109, 114

Where to be tried (see Territorial Jurisdiction), 109, 114, 115, 116

Against Foreign Corporations (see Corporation), 116

Where to be brought when money payable out of Ontario, 116

Where entered in wrong division, 120

By and against clerks and bailiffs, where suable, 123, 124

Against Judge or stipendiary magistrate, where suable, 125

May be tried by consent in any county, 125

Assignment of (see Assignment of Choses in Action), 128

On lost note (see Promissory Note), 127, 128

On judgment of Foreign Court, effect of personal service in Ontario, 132

Notice of (see Notice of Action), 132

ACTION FOR RECOVERY OF LAND-

Not maintainable in Division Courts, 68

When Jurisdiction Ousted, 68

When title is in question, 68

What claims must shew, 68

Must be such as would form defence to the action, 68

Though founded on fraud, or bad faith, may be sufficient, 68

May be incidently brought in question in action of tort, 68

Cases in which title held to be in question, 68, 69

Prohibition may be granted where question of title is not apparent. 69

And will be granted if it appear that title must come in question, 69

Mere bona fide claim of right not sufficient, 69

Where ousted in adjudication as to married women's separate estate, 69

When jurisdiction not ousted, 69

Title must be in question, 69

Cases in which title held not to be in question, 69

Procedure In, 69

Question in discretion of Judge, but decision not final, 69

Decision on conflicting claims not reviewable, except on strong grounds, 69

When claim ignored, ground for should be stated, 69

ve right to

4, 115, 116

io, 116

125

28

service in

nt, 68 , 68

not apparn question,

's separate

39 on strong ACTION FOR RECOVERY OF LAND-Continued.

On question being raised the action stops, 70

Question to be considered on application for prohibition, 70

Costs, 70

Distinction between cases affecting costs and those affecting jurisdiction, 70

Cases where title held in question so as to entitle plaintiff to, 70 Exceptions, 70

Cases in which Division Court jurisdiction sustained, though title in question, 70

Replevin, 80

Question of title ousts jurisdiction in, 80

ACT RESPECTING PUBLIC OFFICERS-

Provisions of, as to sureties, 26

Judge to exercise powers conferred by, 26

ADDING PARTIES-

Witness admitting liability may be added as defendant, 55

Judge may order addition of defendant, primary debtor or garnishee, 142

When order may be made, 142, 143

Duty of Judge imperative, 143

If made before trial summons should be amended and re-served, 142

Rights of parties in such cases, 143

If made at trial service may be dispensed with, 142, 144

Executors or administrators may be added, 144

Effect of Statutes of Limitations, 144

Undisclosed partners may be added at trial (see Partners), 143, 144, 145

Service on partner, 145

ADDRESS-

Of parties to suit, clerk to obtain, 388

ADJACENT DIVISON-

When actions may be brought in division adjacent to defendant's residence, 115

Meaning of, 115, 124

ADJOINING COUNTY-

Judge may sue or be sued in, 125

Clerk or bailiff may be sued in, 124

Transcript of judgment against clerk or bailiff, how enforced, 124 Meaning of, 124

ADJOURNMENT OF COURT-

In absence of Judge, 21

ADJOURNMENT OF SUIT-

Cannot be made if no jurisdiction, 55

Judge may order, 167

Costs on, 167, 168

Other terms, 169

Order need not be served, 169

In jury cases, 169

When order should be made, 169

Terms as to, 169

Consent to, 169

Effect of, 169

Party taking advantage of, cannot repudiate terms, 169

In garnishee proceedings (see Garnishment), 282

See Postponement of Trial

Administrators (see Executors and Administrators)—

May be added as defendants at trial, 144

Adverse Claims (see Garnishment)-

Judge may inquire into and decide upon, 278

Adjudication on, in garishment proceedings, 279, 281

ADVOCATE-

Who may appear as in Division Courts, 170

May appear as such, and as witness as well, 170.

AFFIDAVIT-

On Bonds-

Of execution and justification to accompany bond of clerks and bailiffs, 31

Of justification by sureties on Appeal, 224

Of Disbursements-

To be furnished by successful party to clerk, 38

Effect of false affidavit of, 191

For writ of Replevin (see Replevin), 84

For order changing place of trial, 116, 119

Formal Requirements of, 119, 155, 208, 339

Description of clerk or commissioner taking, 119

Description of parties, 119

of deponent, 119

Signature of deponent, 119

may be in foreign characters, 119

effect of absence of, 119

of commissioner necessary, 119

Date of, 119

Jurat may be looked at to explain, 119

Purporting to be sworn on date not arrived, void, 119

AFFIDAVIT-Continued.

Will not be presumed to have been altered, 119

Effect of omissions in jurat, 119

For order transferring suit entered in wrong court, 122

For substitutional service, 133, 134

Of service (see Service)

to be prepared by clerk, 139

to be annexed to or indorsed on summons, 139

requisites of, 151

may be received notwithstanding defects in, 151

To set aside judgment, requisites of 148, 149

May be received in evidence in certain cases (see Evidence), 207

Before whom to be sworn, 207

For stay of execution (see Execution), 215, 216

For attaching order (see Garnishment), 259

Of service of garnishee summons, 276

For judgment summons (see Judgment Summons), 322

of service of, 322

form of, 322

For writ of attachment (see Absconding Debtor), 335, 338, 339

AFFIRMATION-

May be received as evidence in certain cases (see Evidence), 207

AGENT-

On Ascertainment of Amount-

Signature of, to memo ascertaining amount of claim, 77, 78

Authority of, need not be in writing, 78

usual mode of conferring, 78

may be implied, 78

Principal does not carry on business at residence of, 114

Of Foreign Corporation, Firm, or Individual-

May bring replevin for goods of company when entitled to possession, 81

Definition of, 136

May be served with process, 136

Office or place of business of, 136, 138

Who deemed to be agent of Railway Co., 137

Express Co., 137

Telegraph Co., 137

other companies, 138

At Trial-

Any person may appear as, 164, 170

Authority of, 170

Judge may exclude, 170

AGENT FOR SERVICE (see Appeal)

In appealable cases parties to appoint on making application for new trial, 227

169

clerks and

oid, 119

AGENT FOR SERVICE-Continued.

Effect of failure to appoint, 227

Appointment of, on examination under Commission (see Commission), 205

AGREEMENT not to appeal (see Appeal), 165, 166, 234

ALTERATIONS IN DIVISIONS-

How made (see Division Courts), 10-17 Clerk of the Peace to keep record of, 16

AMENDMENTS-

Power of Judge to allow, 346, 394
Judge may be compelled by mandamus to permit, 5
Cannot be made to give jurisdiction, 59
Where verdict beyond jurisdiction, but claim not, 59
May be allowed where abandonment of excess sought, 59
Of order on judgment summons, power of Judge as to, 383, 384
Principles of High Court as to, may be applied to Division Courts,

Power of Judge as to, in Garnishment proceedings, 282

ANIMALS-

Increase of, subject to replevin, 82, 83 Impounded, replevin of, 85

APPEAL-

Does not necessarily prevent prohibition (see Prohibition), 58 When prohibition will be refused whilst pending, 58 Misinterpretation of law, subject of, 60

Notes of Evidence in Appealable Cases-

To be taken in writing, 164, 165

Unless parties agree not to appeal, 164

Effect of omission to take down evidence, 165

Duty of Judge and clerk as to, may be enforced by mandamus, 221, 228

Agreement not to Appeal, 165

By whom to be signed, 166

Effect of, 166

Applicable to jury cases, 233, 234

Who May Appeal, 216

Any party to a cause, 216, 217

Parties to garnishee proceedings, 216, 217

Parties to interpleader proceedings, 217

Third parties, 217

Parties consenting to appeal, 216

Parties to Mutual Insurance cases, 217

Sum in Dispute, 216, 218

Must exceed \$100, exclusive of costs, 216, 218

Except in Mutual Insurance cases, 217

Addition of interest will not give right to, 218

APPEAL -Continued.

General Principles of, 218

Right to, must be given by Statute, 218

Where right conferred, only one exercisable, 218

Decision of inferior court must be clearly wrong to be subject to reversal, 218

Where point intended to be ruled upon must be raised, 218, 219

Questions of both law and fact subject to, 218

Statutes Relating to, 218

Act relating to County Court, basis for, 216, 218

Provision of that Act applicable, 218

When an Appeal Lies, 219

On questions of law and fact, 219

Only after application for new trial, 219

Not against reasonable exercise of discretion, 219

From refusal of new trial after non-suit, 219

In an interpleader issue, 219

Not against orders of committal, 219

Cases Not Subject of, 219

Mere formal defects in procedure, 220

Questions of practice, 220

Reference to arbitration, 220

Judgment obtained by fraud, 220

Unnecessary orders, 220

Cases subject of, though point not raised in court below, 219

costs in such cases, 219

Where new trial ordered on ground of misdirection, 220

Time For, 220, 222, 223

No formal order necessary before appealing, 220

What is real date of delivery of judgment, 220

Cannot be extended by post-dating judgment, 220

Practice, 220

Parties confined to case shewn by papers certified, 220

Effect of inaccuracy in papers, 220

death of respondent, 220

death of judge, 220

Consent to Appeal, 221

Effect of consent, 221

Need not be in writing, 221

Not applicable to interpleader, 221

In Interpleader Proceedings, 217, 221

Where given in respect of value of goods claimed, 221

How value ascertained, 222

Where given in respect of proceeds of goods, 222

What deemed proceeds, 222

On question of damages, 222

83, 884 n Courts,

see Com-

), 58

ındamus,

APPEAL-Continued.

Cross Appeal, 222

When respondent may ask for more than judgment gives, 222 Effect of, 222

Stay of Proceedings, 222

Proceedings to be stayed for ten days, 222

Effect of, on time limited for giving security, 222

Application and order for, 223

Time cannot be extended by post-dating judgment, 223

Pending appeal, 227

Security, 222, 224

Time limiteà for giving, 223

What requisite, 222, 224

Bond for, amount and condition of, 224

to be approved and filed, 218, 226

sureties in, 224, 225

need not contain recitals, 224

Bond for, effect of, 224

where filed after time limited, 225

if irregular may be withdrawn and new bond sub-

stituted, 224

solicitor not proper surety, 224

sureties must justify, 224, 225

Payment into court, 223, 225

to clerk is, 227

formalities of, will not be looked to, 224

effect of, 223

order for payment out not necessary, 227

Waiver of security, 224

Effect of failure to give, 223, 225, 227

Approval of Security, 218, 224, 226

Notice of, to be given, 224

Mandamus will lie to compel, 224

Judges authority ends on, 224

Respondent entitled to bond free from objections, 226

To be indorsed on bond, 226

Proceedings subsequent to, 226, 227

Judge cannot delegate his authority as to, 228

Justification of Sureties, 225

Who may be sureties, 225

Meaning of "housekeeper" and "freeholder," 30, 225

Requirements of affidavit of, 218

What are and what are not valid objections to sureties, 226

Certifying Proceedings, 226, 227, 228

Duty of clerk as to, 228

Clerk bound to certify if terms of order complied with, 225, 228

And he will be compelled by mandamus to do so, 224

APPEAL - Continued.

Effect of, 227

Duplicate to be furnished by clerk to respondent, 228

Certificate cannot be altered, 228

Judge's decision to be given before certification, 228

Will be received in absence of notes of evidence, 228

But when notes in existence, they must be certified, 221

Certificate not to be made ex parte, 228

To be filed with registrar of Court of Appeal, 229

Agent for Service, 227

To be appointed by parties, 227

Effect of failure to appoint, 227

Setting Down for Argument, 229

Time limited for, 229

Notice of to be given to respondent, 227, 229

Requisites of notice, 229, 230

How time computed, 229, 230

Effect of failure to set down, 229, 231

Or of mistake in copying proceedings or setting down appeal, 229
Quashing Appeal, 230

When application should be made, 227, 230

Costs of, 230

Effect of party appealing proceeding on judgment pending appeal,

Benefit of an order cannot be accepted and burdensome provisions in it appealed from, 330

Judgment in, 230

What judgment may be given in Appellate Court, 230

When non-suit may be ordered, 231

Judge in appeal must hear the case himself, 231

When respondent appears and appellant does not, 281

Dangerous illness in family will excuse attendance of counsel, 231

Proceedings after judgment, 231

Costs, 231

Taxable, between party not to exceed \$15: 231

As between solicitor and client, to be on County Court scale, 231

Cases in which costs will be allowed and disallowed, 231, 232

Effect of omission to provide for, 231

To form part of judgment of the court below, 231, 232

Fees payable under Jud. Act not applicable, 232

APPEARANCE IN COURT-

Proceedings in default of, by defendant (see Default), 166

Application for Prohibition—(see Prohibition)—

When to be made, 56, 57

Effect of delay in, 57

D. C.A,-27

226

es, 222

bond sub-

225, 228

APPLICATION FOR PROHIBITION-Continued.

By whom to be made, 62

To whom to be made, 62

Material in support of, 62

APPOINTMENT-

Of deputy Judge (see Deputy Judge), 19-21

Of clerks and bailiffs, 22

Of deputy clerks and bailiffs (see Clerks and Bailiffs), 24-26

Of receivers (see Receivers), 94, 95

Of appraisers (see Absconding Debtors), 343, 344

APPRAISERS-

Fees to be paid to, 44

To be called to aid of bailiff on seizure under attachment, 343, 344

Duties of, 314

APPRAISEMENT-

Of goods seized under warrant of attachment, 343, 344

Memo. to be indorsed on inventory, 343, 344

Form of memo., 344

APPROPRIATION OF PAYMENTS

In order to take claim out of Statutes of Limitations (see Limita-

tions, Statutes of), 185

Not specially appropriated, applicable in reduction of interest, 211

APPROVAL OF BOND-

Of clerks and bailiffs, (see Sureties) 26, 31

In appeal, (see Appeal), 218, 226

ARBITRATION-

Judge entitled to fees as arbitrator, 19

Effect of rule of building society to refer to, 54

Arbitrator may compel attendance of witnesses, 188

No appeal in cases referred to, 220

Submission-

Order for, may be made by judge on consent of both parties, 283

Consent need not be in writing, 283

More than one arbitrator may be appointed by order of Judge, 284

Parties may agree to refer, 283

Agreement must be in writing, 283

Only one arbitrator may be appointed under agreement to refer, 284

How consent signed by company, 283

Authority of counsel or solicitor to submit, 283

Who may be arbitrators, 283

Trustees and executors may submit to, 283

All nominal parties to action must consent, 283

Effect of third party refusing to proceed, 288

Arbitrator must be named in order and consent, 284

ARBITRATION—Continued.

Proceedings on-

How to be conducted, 284
Private communications should not be received, 284
How witnesses examined, 284
Effect of peremptory appointment, 284
Rules of evidence not applicable, 284
Arbitrator may consult experts, 286
Waiver of irregularities in, 284

Award-

Must be concurred in by all, 284
When invalid, 286
Effect of, 285, 286
To be made within time limited by order, 285
Power of arbitrator to enlarge time for making, 285
Court may not enlarge, without consent, 286
Arbitrator cannot be compelled to make, 286
Formalities and requisites of, 286
How amount found due may be ordered to be paid 286
Power of arbitrator not to be delegated, 286
Nor future power reserved, 286
Ministerial acts may be reserved to be done, 286
Must be verified by affidavit of execution, 286
Subject to an application for new trial, 286

Revocation of Reference-

Cannot be revoked without consent of judge, 285 Cases in which leave should be granted, 285 Effect of death of party to, 285 Not revocable after award except by consent, 285

Costs of-

When not provided for in reference, 284
When power given as to, 284
When costs to abide event, 284
Effect of no direction being given, 284
Payment of, to be taxed by clerk, may be ordered, 286
Effect of direction to pay without fixing amount, 286

Fees of Arbitrator-

Rights of arbitrator as to, 286
What, allowed, 286
Travelling expenses not allowed in addition, 286
Paid for invalid award, not recoverable back, 286
When action for may be brought, 286

Setting aside Award-

Judge may set aside, 287 Grounds for, 287 Time for moving against, 287

24-26

hment, 343,

(see Limita-

nterest, 211

parties, 283

Judge, 284

to refer, 284

ARBITRATION-Continued.

Evidence-

Arbitrator may administer oath or affirmation, 287 Sending an adulterated sample to be used as, a misdemeanor, 287

ARREST-

Judge not subject to, on mesne or final process, 19 Duty of constable or bailiff on making, 43, 44 Persons assisting at, protected equally with constable, 43 Replevin of goods taken under warrant of (see Replevin), 85 When witness protected from, 190 Formalities required on, 331, 332 Of judgment debtor on warrant of commitment, 331, 332 duties of bailiff in respect of, 331

ASCERTAINMENT OF AMOUNT-

Sufficiency of signature (see Jurisdiction), 75, 77, 78 Tables of cases on, 76, 77 Assignee of debt may maintain action, 78

ASSAULT-

On bailiff or assistant in discharge of duty, 372 Proceedings and penalty thereon, 372

ASSENT-

Of parties cannot cure total want of jurisdiction, 56

Assignee-

Of debt may maintain action when amount ascertained, 78 Of replevin bond may sue in his own name, 86

Assignee in Insolvency-

Goods in hands of, not repleviable, 82

Assignment of Judgment-

When co-surety entitled to (see Joint-Debtors), 141

Assignment of Replevin Bond (see Replevin Bond), 86

Assignments of Choses in Action-

Action to be brought in name of assignee, 128 Assignee must take full beneficial interest, 128 Effect of mortgage of debts, 128 Assignments of part of debt, 128 Splitting demands by, 128 Debtor cannot disregard equitable assignment of part, 128 Effect of debtor's consent, as by accepting order, 128 Costs in such cases, 128 Parties to action on partial assignment, 128 When accepted order equivalent to payment, 128 Assignment of book debts prevents garnishment by assignee, 246 Rights of assignee as against judgment creditors, 251, 252

ATTACHMENT-

Will not lie against Judge for disobeying certiorari, unless acting contumaciously, 19

Division Courts may enforce orders by, 91

For breach of injunction (see Injunction), 93

Of Goods of Absconding Debtor (see Absconding Debtor), 335-355

When superseded, 340, 341

Effect of execution of, by unauthorized person, 340

When Judge or justice of the peace may issue, 342

Proceedings on, 343-354

Goods seized under, may be replevied by third person (see Replevin), 82

ATTACHMENT OF DEBTS (see Garnishment), 244-283

Debts attachable, 246

Claims not attachable, 248

Rights of other parties, 251

Wages or Salary, 253-258

Attaching order after judgment, 259-266

Where primary creditor's claim not a judgment, 267

General provisions, 270

ATTORNEY (see Solicitor)

Judge cannot act as, 19

May appear at trial, 170

Authority to bind client (see Solicitor), 170

May appear as such, and as witness in cause, 170

AUTHORITY-

When cannot be delegated, 11, 18

Power of legislature to delegate, 24

Of judge ends on refusal of new trial and approval of appeal bond, 224

Construction of Statute as to, 241

AWARD-

Requisites and formalities of (see Arbitration-Award), 285, 286

В.

BAIL-

Who competent as, 225

BAILIFF-

Every Division Court to have, 21

Who competent for, 21, 22

Lieutenant-Governor to appoint, 22

ct, 128

ned, 78

emeanor, 287

e, 43

332

vin), 85

z assignee, 246

1, 252

BAILIFF -- Continued.

Leave of absence to, 24

Appointment of deputy bailiff, 24, 25

Removal of deputy, 24

Responsibility of sureties for deputy's acts, 24, 25

Security-

Must be given by, 26

Nature of security and liability thereon (see Security and Sureties), 26-31

Duties not to be performed until given, 31, 32

Covenant to be available to suitors, 32

Bond may be sued in any court of ompetent jurisdiction, 32

Certified copy of covenant to be evidence, 32

Entries in books to be evidence against sureties, 32

What word "bailiff" to include, 32

Death, or withdrawal, or insolvency of surety, 33

Procedure where surety discontinues, 33, 34

Liability of former sureties, 33

Dismissal and Suspension of-

When Judges may suspend or remove, 23

May be suspended by Judge for cause, 23

Service of process in such cases, I38

Lieutenant-Governor may dismiss, 23

Duties of-

On separation of county, 14

To be performed as regulated by Act and rules, 21

Refusal to perform, a misdemeanor, 22

iterusar to perform, a misuemeanor, 22

Cannot be performed until bond filed #5

To serve and execute process, 41

To return same to clerk when served.

Not required to travel beyond limits of a sion, 41

Not allowed mileage beyond county, 41, 42

Not to canvas in political elections, 42

To attend clerk's office at proper intervals, 42

To make out list of process for service, 42

May call in assistance in execution of, 42

Not essential that services be made by, 42

Responsibility for service of process, 42

Forfeiture of fees for failure to return, 42, 47

rorienture of fees for failure to return, 42, 47

Process of execution to be executed by, 42

To see that executions promptly executed and returned, 42

To see that executions prompery executed and resurred

To act as constable during court, 48

Duty and power as constable, 43, 44

See also Warrant of Commitment

Duty of, on making arrest, 43, 44

Not to collect on commission, 47

Balliff-Continued.

Execution of power of sale under mortgage, or landlord's warrant not prohibited, 48

To produce books, etc., for inspection, 51

To report to inspector when required, 51

To inform inspector of appointment, 52

and of change in sureties, 52

To produce to inspector certificate of filing covenant, 52

To keep cash book, 53

To make annual return to inspector of fees, etc., received, 53

In serving summonses (see Service), 130-132

In actions of replevin (see Replevin), 79-88

Summons need not be served by, 132

Papers for service from a distance may be sent direct to, 138

Not bound to serve or execute process out of division without order of judge or clerk, 138

Duty and liability in respect of such process, 139

Order for service to be endorsed on writ when served by other than bailiff, 139

Not bound to pay over moneys without demand, 139

May take confession of debt, 288

On execution of warrant of commitment (see Judgment Summons), 331-333

And liabilities in respect of executions (see Execution), 293 et seq. Property liable to seizure by (see Execution and Attachment), 294-296, 314-316

On seizure of securities, cheques, notes, etc., for benefit of plaintiff (see Execution), 316-319

In what order executions to be enforced, 293, 294

Return of nulla bona by. 310

In attachment proceedings (see Absconding Debtor), 343-354

to execute warrant, 343, 344

to make inventory of goods, 343, 344

to have goods appraised, 343, 344

to return warrant, inventory and appraisement to clerk, 343, 344

to retain custody of goods, 347, 348

to sell perishable goods, 352, 353

to take security in such cases, 353

to pay over proceeds of sale to clerk, 353, 354

And liabilities in interpleader proceedings (see Interpleader), 356-

As to claims of landlord for rent (see Landlord), 365-369

Not to purchase goods sold under execution, 320

Execution not to be renewed at instance of, 309

On payment or tender by debtor of amount of execution, 304, 305

Effect of seizure by, when sale after removal from office, 296

ed, 42

nd Sureties).

tion, 32

Bailiff-Continued.

Suite By and Against-

May be brought in adjoining division, 123

May be sued in adjoining county, 124

Procedure on transcript of judgment against, 124

Enforcing execution against, 124, 375, 376

Action for neglect in returning execution, 875

Liability of-

For default in paying over money, 27

what moneys within covenant, 27

For non-performance of duty: 28

For misconduct, 29

Rights of sureties against, 30

Actions against, 29, 30

Prohibition will not lie for excessive seizure, 60.

Defence of denial in action of replevin, 84

For not executing writ of replevin, 84

For wrongfully refusing to assign replevin bond, 86

For taking insufficient bond in replevin, 87

In respect of execution of foreign process, 139

Cannot be called to account by judge of foreign court, 306

For excessive seizure, 340

For irregularity in notice of sale, 318, 319

In respect of perishable goods seized, 353

For sale of goods below value, 319

Misconduct of-

Defined, 373

Acting under colour or pretence of process, 373

Extortion, 373, 374

Delay in payment of money, 373, 374

Penalty therefor, 373, 374, 375

Negligence of-

What deemed to be, 374, 375

Wilfully making false returns, 375, 376

Where proceedings may be taken, 375

Penalty for, 375

How penalty enforced, 375, 376

Action against bailiff and sureties for neglect in returning execu-

tion, 375

When execution may issue, 376

Liability of sureties if bailiff removed from county, 376

Form of Covenant by, 403

Fees (see Fees)

To be paid by, 44

To be paid to clerk before execution issues, 46

Lien for, when suit settled or defendant makes assignment, 46, 47

BAILIFF - Continued.

To be forfeited by neglect to return execution, 47

On intervention by sheriff, to be taxed by clerk and paid by sheriff,

Assault on-

While in execution of duty (see Resisting Officers), 372 Protection of (see Officers of Court), 378-381

BALANCE OF UNSETTLED ACCOUNT—
(See Unsettled Account), 102, 105

TIANK NOTES-

Liable to seizure under execution, 314

BARRISTER-

May be appointed to act as deputy judge, 19 Clerk not to practice as, 22 Judge may refuse to allow appearance by, in certain cases, 170 Authority of, to bind client, 170

BEES-

Replevin will lie for (see Replevin), 83

BEQUEST -

Validity of, not to be tried in Division Courts, 54, 71

BILLS OF EXCHANGE AND PROMISSORY NOTES-

Where action may be brought on, when given for insurance premiums, 115

May be seized under execution (see Execution), 314-317 (See Promissory Note)

BILLS OF SALE-

Having effect of unjust preference, replevin of goods under (see Replevin), 85

BOARD AND LODGING-

When wages of debtor exempt in action for, 253, 254

No exemption when debtor unmarried and having no family to depend on him, 254

Meaning of term "board and lodging," 254

BOARD OF COUNTY JUDGES-

Existing board and their authority to continue, 389 Effect of revision of statutes on rules then in force, 390

Appointment of, 390

Constitution of, 390

Definition of "retired county judge," 391

Authority of, 390, 391

Rules respecting clerks and bailiffs, 390, 391

Amendment of rules, 390, 391 Scope of board's power, 391

nent, 46, 47

ning execu-

306

BOARD OF COUNTY JUDGES-Continued.

Authority of legislature to delegate power to, 391

Procedure by, 392

of High Court on transmission of rules for approval, 392

Force and effect of rules when approved, 392

Authority of Legislature as to, 393

No provision as to publication, 394

Expenses of board provided for, 393

Boxds-

By Clerks and Bailiffs -

Nature of, and liability thereon (see Sureties), 26-31

Scope of covenant in, 27

Actions upon, 27-30

When sureties die, 30

To be approved of by judge, 26, 31

To be verified by affidavits of execution and justification, 31

To be filed with Clerk of the Peace, 31

Effect of omission by clerk and bailiff to execute, 32

See Security and Sureties, 32-35

In case of death, withdrawal or insolvency of surety, 33, 34

Provision of Act Respecting Public Officers applicable to, 34, 35

Information respecting, to be given to inspector, 52

In Replevin (see Replevin Bond), 85-87

In Appeal (see Appeal), 224

Where suable when given in course of proceedings in Division Courts, 354

Effect of bringing actions thereon in High Court, 354

To be delivered up to party entitled thereto to be enforced or cancelled, 354

In Attachment-

To be given in order to obtain release of goods, 348, 349

To given by creditor on sale of perishable goods, 353

BOOKS OF ACCOUNT-

Production of (see Witness), 188

on examination of defendant on motion for judgment, 150, 160

Receivable as evidence in certain cases (see Evidence), 207

Production of, power of High Court as to not applicable, 393

BOOKS OF OFFICERS OF COURT-

Entries in, to be evidence against sureties, 32

Procedure book, 37

Entries in, and certified copies to be evidence, 37

To be open to the public and accessible to Judge and inspector, 38

Disposal of, on death or removal of clerk, 40

Books of Officers of Court—Continued.

Penalty for wrongfully holding, 40
Inspection of (see Inspector), 50
Inspector to see that proper books are kept, 50
Disposal of, when clerk changed, 40

BUILDING SOCIETY-

Rule of referring disputes to arbitration, effect of, 54 Where action for calls to be brought, 115 Whole amount in arrear to be included in one call, 115

BREACH OF THE PEACE-

When bailiff may arrest for, 48 Definition of, 48

Breach of Promise of Marriage—

Not maintainable in Division Courts, 54, 72

Breach of Trust—
Offence of, what is, 327

C.

CALLS-

Actions for, where brought (see Building Societies), 53

CARRYING ON BUSINESS-

Definition of, 118
Application of term, 118
To firm with branch office, 118
surgeons and apothecaries, 118
builders and contractors, 118
railway companies, 118
other corporations, 113
Appointment of general agent, effect of, 114
Appointment of agent with limited authority, effect of, 114

Cash Book-

Clerks and bailiffs to keep, 53

CATTLE-

Increase of, may be repleved (see Replevin), 82, 83 Impounded, replevin of, 85

CAUSE OF ACTION-

When barred by judgment against joint debtor, 3, 4 In which Division Court jurisdiction prohibited, 58 Combining (see Combining Claims), 74, 78

ı, 31

proval, 392

3, 34 o, 34, 35

Division

ed or can-

for judg-

e, **3**93

spector, 38

CAUSE OF ACTION-Continued.

Dividing (see Splitting Demands), 102

What included in, 102, 104, 109

Removal of, by certiorari (see Certiorari), 106

Where to be entered and tried (see Territorial Jurisdiction), 109

Definition of, 102, 104, 109

Where it arises, 110, 111

Who are parties to, 217

What are subject of garnishment (see Garnishment), 244

Strictly for damages, what are, 245

CERTIFICATE-

Of filing officer's bond, 82

CERTIFIED COPIES-

When receivable in evidence (see Evidence), 32

CERTIORARI-

Disobedience of, Judge not liable for unless contumacious, 19, 108 Not issuable in action against a J. P. after notice of objection by

him, 73, 107

Not applicable to replevin, 84, 107

Nor to interpleader, 107

When action removable by, 106

Application for, how made, 106

time for making, 107

Not applicable where Division Court without jurisdiction, 107

Nor to determine question of jurisdiction, 107

Will not lie after verdict, 107

Setting aside for irregularity of proceedings on, 107

Cases in which writ will be granted, 107, 108

What must be shewn on, 107

Effect of omission to shew all material facts, 107

Waiver of right to, 107

Plaintiff cannot apply for, 108

Order for, 108

may be ex parte, but not usually so, 108

where court refused to make terms in, as to costs, 108

Affidavit for, 108

How entitled, 108

Application must be made by party himself, 108

Must be made in chambers, 108

When refused, court will not usually interfere, 107

When in dismissing plaintiff was ordered to submit to examination, 108

Statute taking away not applicable when total want of jurisdiction, 108 CERTIORARI-Continued.

Return to, 108

What required on, 108

Proceedings after Removal-

What court will direct on, 108

Where papers to be filed, 108

Where venue to be laid, 108

Where regularly issued, court will not interfere with, 108

No mode of compelling plaintiff to proceed, 108

Plaintiff cannot declare for different cause of action, 108

Judge in Division Court no right to interfere, 108

* Costs of removal, 108

CHALLENGING JURORS-

Right of (see Jury), 237

CHANGE -

In time and place of holding courts, 5, 6

Proceedings on alterations in limits of divisions, 13

CHANGING PLACE OF TRIAL -

To what claims applicable, 118

Meaning of "debt or money payable," 118

General jurisdiction not affected by, 118

Right to entertain action to continue until close of case, 118

Application for, 116

When to be made, 116, 118, 130

Judge cannot enlarge time, 130

By whom to be made, 116, 118

Proceedings on, 116-119

Affidavit, by whom made, 117, 119

What are satisfactory reasons, 119

Notice to plaintiff, 119, 120

Costs of, 120

Effect of death of party, 120

Proceedings in absence of Judge, 118

Order for-

To direct at what sittings cause to be tried, 117

To be attached to summons, 117

Transmission by clerk, 117, 120

Effect of abandoment of, 120

Service of, 117, 120

Proceedings after transfer, 117, 120

clerk to enter minute of, 117, 120

to be carried on as if originally entered in that court,

117, 120

payment of clerks fees, 120

time for entering dispute note, 120

us, 19, 108 jection by

n), 109

n, 107

108

examina-

f jurisdic-

CHANGING PLACE OF TRIAL-Continued.

When Action Entered in Wrong Court-

Proceedings to be transferred (see Territorial Jurisdiction), 120 Notice respecting, to be indorsed on summers, 129

CHEQUES-

When liable to seizure under execution (see Execution), 314

CHIEF PLACE OF BUSINESS-

Of corporation, firm or individual (see Corporation), 136, 137

CHOSES IN ACTION-

Assignments of (see Assignment of Choses in Action), 128

CITY-

Defined for purposes of Act, 2

To be at least one Division Court in each, 2

Number of sittings requisite in, 6

Where two courts established in, offices may be kept and courts held in same division, 6

CLAIM-

Exceeding jurisdiction cannot be amended to give jurisdiction, 59 But excess may be abandoned (see Abandonment of Excess), 59, 78, 106

Jurisdiction of Division Court on, 73-75

Combining several (see Combining Claims), 74, 78

Against absconding debtor (see Absconding Debtor), 74, 78

Where to be entered and tried (see Territorial Jurisdiction), 109, 114, 115, 116

Where entered in wrong division, proceedings thereon, 120

Against clerks and bailiff where suable, 125, 124

Entry of, for service, 127

What must be shewn by (see Particulars of Demands), 127, 147 148, 151

Notice disputing, 145

Strictly for damages, what is, 245

What subject of attachment (see Garnishment), 246-248

Proof of, in actions for less than \$15: 167

over \$15: 167

in tort or trespass, 167

discretion of judge as to, 167

What not subject of attachment, 248-256

CLAIMS OF LANDLORDS AND OTHERS (see Landlord), 355, 365

CLERK OF DIVISION COURT-

Seal usually adopted by, 3

How seal may be obtained by, 3

Office of, in cities, 6

CLERK OF DIVISION COURT -- Continued.

Every Division Court to have, 21

Who may be, 21, 22

Lieutenant-Governor to appoint, 22

How appointed prior to 5th March, 1880: 22

County Crown Attorney to act as, when office vacant, 40

Penalty for withholding records of office, 40

Leave of Absence, 24

May be granted to, 24

Appointment of deputy in such case, 24

Responsibility for acts of deputy, 24

Appointment of deputy when prevented from acting by illness, etc., 25

Security-

n), 120

314

3, 137

28

and courts

sdiction, 59

Excess), 59,

78 iction), 109,

120

s), 127, 147

Must be given by, 26

Nature of, and liability thereon (see Sureties), 26-31

When to be filed, 31, 32

Books and papers of office not to be delivered until security filed, 40

To be available to suitors, 32

Where action on may be brought, 32

Copy of covenant to be received in evidence, 32

Entries in books to be evidence against sureties, 32

What word "clerk" to include, 32

On death, withdrawal, or insolvency of surety, 33

Procedure when surety discontinues, 33, 34

Provisions of Act respecting Public Officers applicable, 34, 35

Liability of former sureties, 35

Form of covenant, 403

Suspension and Removal of-

When Judge may suspend or remove, 23

Lieutenant-Governor may dismiss, 23

Incompetency, meaning of, 23

May be suspended by judge for cause, 23

Notice to provincial secretary in such case, 23

Disposal of books, etc., when clerk changed, 40

Actions By and Against-

May be brought in adjoining division, 123

Before appointment, to be continued in same court, 123, 124

May be sued in adjoining county, 124

Enforcing execution against, 124

Procedure on transcript of judgment against, 124

When mandamus is issuable against (see Mandamus), 64

Fees-

To be paid by (see Fees), 44

Table of, to be hung up in office, 44

To be paid in advance, 45

CLERK OF DIVISION COURT-Continued.

Bailiffs', to be paid before execution issues, 46

Disposition of, and of emoluments earned, 48, 49

Proceedings to enforce payment of, (see Fees), 45, 46

Not to collect, on commission, 47

On order changing place of trial, 120

On transfer of proceedings entered in wrong court, 122, 123

Prepayment of, may be insisted upon, 126

Not to be charged for copies of claim attached to summons, 127 $Duties\ of -\!\!\!-$

On separation of county or transfer of proceedings, 14

In absence of Judge, to adjourn court, 21

To be performed as required by Act and rules, 21

Refusal to perform, a misdemeanor, 22

Not to practice as a barrister or solicitor, 22

May act as conveyancer or notary, 22

may act as conveyancer or notary, 22

Non-performance of, liability for, 28

Covenant to be filed before entering on, 31, 32

To issue all summonses, etc., 36

Where want of jurisdiction clear, summons not to be issued, 36

To see that process not used for improper purpose, 36

Performance of, enforceable by mandamus, 37

To keep record of all summonses, process, etc., and returns, 37

To sign every page of proceedure book, 37

To issue warrants and write of execution (see Execution), 38

To tax costs (see Costs), 38

To keep account of all fines (see Fines), 38

To furnish Crown Attorney with account of fines verified by affidavit, 39

To furnish Judge with verified account of moneys received and paid out, 39

To make annually list of suitors money, 39

To post same in court and office, 39

To make annual return to Provincial Treasurer of emoluments received, 49

To pay over excess of emoluments to Provincial Treasurer, 49

To produce books and documents for inspection, 51

To report to inspector when required, 51

To inform inspector of appointment, 52

and of change of sureties, 52

To produce to inspector certificate of filing covenant, 52

To make annual return of business to Lieutenant-Governor, 53

To keep cash book, 53

To make annual return to inspector of all fees, etc., received, 53

On order changing place of trial, 120

to transmit proceedings, 117, 120 effect of refusal to perform, 120

CLERKS OF DIVISION COURTS-Continued.

On order on transfer when action entered in wrong court, 121, 122

To forward summonses for service in other divisions, 126

Of clerk receiving process for service, 126

Prepayment of fees in such cases, 126

Not bound to prepare claim, 128

To annex particulars to summons and furnish copies for service, 128

Effect of neglect to do this, 129

May send process for service or execution at a distance direct to bailiff, 138

To prepare affidavits of service, 139

Notices by, 162

requisites of, 162

to shew place and time of sitting, 162

To make annual return of jury fund to county treasurer, 242, 243

To give notice to parties in garnishee proceedings when jurisdiction disputed, 256

To pay juror's fees, 243

Notices required to be sent by, in garnishee proceedings, 271

To keep a debt attachment book, 282

Entries required to be made therein, 282, 283

May take confessions of debt, 288

To give notice of return of nulla bona to execution on transcript, 307

Not to purchase goods sold under execution, 320

To make annual return of commitments, 335

To give notice of receipt of money, 387

Form of notice, 388

To pay unclaimed money to County Crown Attorney, 389.

To obtain address of parties to suit, 388

Misconduct-

Liabilities of sureties for, 29

Punishment for wrongfully holding moneys, books or papers, 40

Acting under colour or pretence of process, 373

Extortion, 373, 374

Oppression, 378

Protection of-

(See Officers of Court), 378-381

CLERK OF MUNICIPALITY-

To indicate in voters' list persons eligible as jurors, 235 To furnish Division Court clerk with copy of voters' list, 236 Proceedings against, for refusal to furnish such list, 238 Penalty therefore, 239

D.C.A.-28

2, 123

mons, 127

issued, 36

turns, 37

on), 38

ified by affi-

ved and paid

emoluments

urer, 49

52 ernor, 53

cinoi, oc

ceived, 53

CLERK OF THE PEACE-

Appointment of, 16

May compel municipality to furnish him with accommodation, 8 Duties of, in respect of establishment and alteration in divisions of courts (see Courts), 11, 15, 16, 17

Covenant of clerk and bailiff to be filed with, 31

Fee thereon, 31

To give certificate of filing, 31

Copy bond certified by, to be received in evidence, 31

COMBINING CAUSES OF ACTION-

When claims for distinct causes against same defendant may be combined, 74, 78

Examples of such claims, 78

Finding on claims so joined to be separate, 75

COMMENCEMENT OF ACTION-

What is, 36

COMMISSION TO TAKE EVIDENCE-

Power of court to issue, 195, 199

Not usually granted for examination of applicant or his employee,

Application for-

To be on notice of motion, 196, 204

What notice to state, 204

Not to be made for delay, 195

When to be made, 195

What should be shewn on, 190

Where witness travelling, 197

Opposite party may name another commissioner, 204

Procedure in such cases, 204

Costs in such cases, 206

Grounds for granting, 196

Fear of criminal proceedings no ground for, 199

Experts not to be examined on, 196

Granting discretionary, 196

Order For-

Should not be made ex parte, 198

Will be made to suit circumstances, 196

Time, place and manner of examination to be fixed by, 196

How to be framed, 196, 204

Cases in which it may and may not be granted, 196, 199

May sometimes order evidence to be taken viva voce, 196

Oath of commissioner may be dispensed with by, 198

To be read as incorporating Consolidated Rules, 206

Consolidated Rules applicable to, 204-206

COMMISSION TO TAKE EVIDENCE-Continued.

Interrogatories-

How to be framed, 197

Part of an interrogatory cannot be abandoned, 197

In chief to be delivered to opposite party, 205

Cross interrogatories, 205

Effect of default in delivery of, 205

Notice of Execution-

Opposite party may require, 205

To appoint agent for service in such case, 205

Requisites of service, 205

If not required, examination may be ex parte, 205

So also if agent's name fictitious or if he fails to attend, 205

What notice to contain, 205

Production of Books, etc .--

Notice to produce to be given, 197

Extracts may be taken from, 205

Certified copies may be annexed to commission, 205

Office Copies-

May be given in evidence at the trial, 206

The Commission -

To be directed to person named in order, 204

When a second commission may issue, 196

Due notice to be given to opposite party, 197, 204

Should authorize commissioner to administer the oath to himself,

196

Copy of interrogatories to be annexed, 197

Effect of not issuing promptly, 197

Indorsement of style of cause unnecessary, 198

To be framed so as to bind witnesses by their oath according to religion, 198

What are and are not valid objections to, 198

Effect of one commissioner refusing to act, 20^R

Examination-

How to be taken, 197, 205

To be on oath or otherwise according to religion, 205

Procedure where witness does not understand English, 205

Improperly taken will be rejected, 196

Reception of improper evidence to be objected to on, 196

May be viva voce in some cases, 197, 198

Under what circumstance, evidence taken not receivable, 197

What not deemed irregularities in return to, 197

Need not be annexed to commission, 198

Questions may be put viva voce, 198

Must be taken on interrogatories unless otherwise ordered, 198

Depositions to be subscribed by witness and commissioner, 205

, 196

modation, 8

in divisions

dant may be

is employee,

00

96

00

COMMISSION TO TAKE EVIDENCE-Continued.

Affidavit of Execution of-

Signature of person authorized to take, presumed genuine, 197 If substantially shewing due execution will be sufficient, 197

What held not to be objectionable, 197

Must identify depositions, 197

Who to be sworn before if taken in Quebec, 197

Objections to Commission-

If not taken, are waived, 198

When technical objection should be taken, 198

What held to be valid objections, 197, 198

What are not valid objections, 197, 198

Return of-

How made, 197, 205

To be made to clerk of court in which action pending, 206

To wrong office, held no objection, 197

Must be enclosed in envelope under hand and seal of commissioner with an affidavit of due taking, 198, 206

Costs of Commission-

To be in discretion of judge, 206

To be added to costs in suit, 206

How recoverable, 206

Examination de Bene Esse-

May be ordered of witnesses unable to attend trial (see Evidence),

Examination of witness residing in remote part of province (see Evidence), 203

Rules of High Court, to apply, 204

Consolidated Rules applicable, 204-206

COMMITMENT-

To wrong gaol, liability of judge for, 17, 18

For wrongfully holding money, books, etc., 40

Must be to gaol of county where arrested, 41

Order for, not subject of prohibition. 60

For disobedience to injunction (see Injunction), 90

For disobedience to order of court, 90

Of Judgment debtor (see Judgment Summons), 325

Grounds for, 325-327

Order for, upon adjudication when debtor appears, 328, 329 on non-attendance of debtor, 329, 330

Warrant of, 330

Execution of warrant, 330-333

Constables required to execute, 332

Duty of gaolor as to, 332, 333

Discharge of debtor, 333

Return of, to be made by clerk annually, 835

nine, 197 t, 197

206

mmissioner

e Evidence).

province (see

, 329

COMMITMENT-Continued.

Of defendant may be ordered at the hearing in certain cases, 334

For contempt of court, (see Contempt), 369-371

Of bailiff or other officer for misconduct, 373, 374

Power of court to commit for disobedience of its orders, 90, 371

COMMODITIES-

Proceedings on judgment where contract payable in (see Judgment),

COMPANY (see Corporations)-

In liquidation, notes due to may be garnished, 248

Procedure in such cases, 248

COMPULSION-

Of legal process, money paid under, not recoverable, 4

Effect of payment by garnishee under (see Garnishment), 262-277

COMPUTATION OF TIME (see Time), 21, 33, 52, 118, 386

CONFESSIONS OF DEBT-

Clerks and bailiffs may take, 288

Requisites of, 288

When taken before suit, what requisite, 288

When made, and plaintiff entitled to judgment, he may elect to pro-

ceed on either, 288

Partner cannot give without authority, 288

Non-executing partner may waive right to set aside, 288

Power of defendant's attorney to give, 288

Power of executor as to, 288

May be taken as additional security for debt, 288

Given by maker no defence to action against endorser of note, 288

Effect of death of one of two defendants after, 288

Effect of when not given in prescribed form, 288

Does not operate as unjust preference (see Addenda), 289

CONSENT-

Cannot cure total want of jurisdiction, 125

Trial by, may be in any division, 125

requisites of, in such cases, 125

What is, 125

Implication of, by acts or conduct, 125

To appeal (see Appeal), 217, 221

not applicable to interpleader, 221

Amendment of judgment by, 5

To postponement of trial, 169

CONSOLIDATED REVENUE FUND-

Costs of seal to be paid out of, 2

Fines recovered to form part of, 387

Unclaimed moneys to form part of, 389

Fees forfeited by bailiff to form part of, 47

CONSTABLE-

Bailiff to exercise authority of, during court, 48
Power of, to apprehend offenders, 43
Private persons sometimes bound to aid, 43
Persons assisting protected, 43
Liability for arrest of wrong person, 43
When a prisoner may be handcuffed, 43
Duty of after arrest, 43, 44
Action against for goods seized under illegal conviction, 86
To aid in execution of warrants, 332
Execution of warrant of attachment against absconding debtor, 344

CONTEMPT OF COURT-

Power of judge to punish for, 369
What constitutes, 369, 370, 371
Inherent powers of courts respecting, 369
How power should be exercised, 371
Penalty for, 369, 371
When and how penalty may be enforced, 370, 371
Meaning of "wilful insult," 371
Commitment for, requisites of, 371
Release of party, how obtained, 371
When Appellate Court will review order of committal, 372
Liability of judgment debtor for, on refusal to attend on examintion in County Court, 313
Power of court to commit for disobedience of its orders (see Powers of Court), 90, 371

CONTRACT-

What actions on, are subject to Division Court jurisdiction, 73, 75, 102

Though for payment in labour, etc., judgment may be for payment in money, 79

No demand necessary in such cases, 79

Duty of buyer on contract for delivery of wheat, F. O. B. 79

Where personal services are proffered and refused there can be no recovery, 79

Contract in such case assignable, 79

Stipulations not of the essence of, relief against, 89

Relief against penalties and forfeitures in, 88, 91

Power of courts to disregard such stipulations, 91

What it is necessary to prove in action on, 110

Where cause of action arises on, 110

Illustrations, 110

CONVERSION OF CHATTELS-

Jurisdiction of Division Courts in action for, 61

CONVEYANCER-

Judge may not act as, 19 Clerk may act as, 22

CONVICTION-

For offences under Act, 377 Form of, 378

COPIES-

Of officer's bond, certified, to be received in evidence, 32 Of entries in clerk's books to be evidence, 32 Office copies of evidence taken on commission to be received, 206

CORPORATIONS-

Where deemed to reside, 112 Place of business of, 113

Execution put in force against, after winding-up order, void, 319 Proper remedy in such cases, 319

Directors or officers not liable to examination on judgment summons, 322

Foreign-

Where action may be brought when head office out of province and cause of action arose in different divisions, 116 Service on, where there is a resident agent, 136

Chief place of business of, 136, 137

Agency of (see agent), 136, 137

Debt in hands of resident agent attachable, 247

Liability of, to garnishee process (see Garnishment), 259, 260, 268

CORPOREAL HEREDITAMENTS-

Action for, not maintainable, in Division Courts, 54 What are, 70

Costs-

Taxation of, a proceeding, 18

Clerk to tax, subject to revision of Judge, 38

Proceedings on, 38

on revision, 38

Clerk not bound to pay successful defendant costs out of money deposited in court, 45

To be paid to clerks and bailiffs in advance, 45

Enforcing payment of, 45 Of application for prohibition, 63

Of proceedings on mandamus, 65

When title brought in question, 70

On removal by certiorari, 107, 108

Of application to change place of trial, 120

On transfer of suit entered in wrong court, 121-123

ebtor, 344

72 examin.

e Powers

ction, 73,

for pay-

79 an be no

Costs-Continue .

On judgment on default of appearance in court, 152

On motion for speedy judgment, 154, 160

On postponement of trial, 167-169

On decision of question of tender and payment into court, 176

On payment into court in satisfaction of claim, 178

Of commission to take evidence, 206

In appeal (see Appeal), 281

In actions against officers of court, 386

Of garnishment proceedings, 275, 281

Of submission to arbitration, 284, 286

Execution for when debt recovered, 301

Of proceedings on judgment summons, 324

In the Cause-

Postage of papers to be, 138

Definition of, 138

Authority of Judge as to, 289

Power to award where no jurisdiction, 289, 290

Of Witnesses-

Where claim disputed, and defendant afterwards confesses judgment. 291

In Actions on Judgments, 291

Not allowed, unless other actions joined, 4

Not to be allowed without order of Judge, 291

COUNSEL-

Judge not to practice as, 19

May appear as and as witness in same cause, 170

Judge may exclude in certain cases, 170, 171

Authority of, to bind client, 170

Counsel Fees-

May be allowed in contested cases for over \$100: 290

COUNTER-CLAIM-

Provisions of Judicature Act as to, 88

Division Courts vested with same power as High Court, 179

Definition of, 96

Distinguished from set-off, 96, 179

Effect of distinction, 180

Requisites of, 96, 97

Matters which may be raised by, 97, 98

Where defendant may be ordered to give security for costs on, 97

Judgment on, not to be given until plaintiff's claim tried, 97

Plaintiff cannot discontinue after delivery of, 97

Courts will give effect to equitable rights though not set up by

COUNTER-CLAIM-Continued.

What may be raised in action by assignee of a debt, 97
Effect of not setting up on defendant's claim, 97
Cannot be raised against defendant by person named in defence, 97
May be investigated by Division Courts, though beyond jurisdiction 09

Proceedings may be transferred to the High Court in such cases, 99 Costs of, 188

COUNTY-

To include two or more united counties, 1
Definition of, 2
Number of courts in each, 2
Allowance to, for use of court house by city or town, 9
Separation of junior from senior, courts to continue, 12
Service of process on municipality (see Service), 131

COUNTY COURT-

Transcript of judgment to (see Transcript), 310 Examination of judgment debtor on judgment in, 313

COUNTY CROWN ATTORNEY-

May compel county to furnish accommodation, 7
To hold books, etc., of Division Courts when clerk changed, 40
To act as clerk when office vacant, 40
To pay fees forfeited by bailiff to Provincial Treasurer, 47
Renewal of execution by in certain cases, 309
To pay unclaimed moneys to Provincial Treasurer, 389

COUNTY TOWN-

Definition of, 2 Courts to be established in, 2 Sittings to be held in court house, 9

COUNTY TREASURER-

To keep account of Jury Fund, 242 Duty of, as to payment of jurors (see Jurors), 243

COURT HOUSE-

Holding courts in, 6
Sittings in county town to be held in, 9
Remuneration for use of, how adjusted, 9
Maintenance of, 9

Court Room-

Municipality to furnish, 7 Rent of, how payable, 7

COURTS-

Of request abolished, 1 Division Courts established to be continued, 2

fesses judg-

purt, 176

, 179

osts on, 9**7** d, 97

set up by

COURTS - Continued.

Number of, 2

To have a seal. 2

Not to be Courts of Record, 3

Judgments of, to have force and effect of Courts of Record, 3

Time and place of holding, 5, 6

Where held when no proper court room provided, 7

Expenses for accommodation, how payable, 7

Provision for, when municipality not a town or city, 7

How sittings regulated in remote or inaccessible districts, 9

Alteration in number, limits and extent, how made, 10

Establishment of, 11, 12

How numbered when established, 12

Must be confirmed by Lieutenant-Governor in Council, 12

No business to be transacted in, till officers appointed, 12

On separation of junior from senior county, courts to continue, 12

Continuance of proceedings when divisions changed, 13

Continuance of proceedings when limits are in both senior and junior divisions, 14

Regulation of limits on separation of a county, 14

Clerk of the peace to record time and place of holding, 16

Who may preside over, 17

When sittings of County Court or General Sessions at same time as Division Court, 19

Who to preside on illness or absence of Judge, 19

Provision for adjournment in absence of Judge, 21

Holding of, in territorial districts, 21

Officers of (see Clerks and Bailiffs), 21, 22

Jurisdiction of (see Jurisdiction), 53

Powers of (see Relief), 88-98

Equitable powers conferred upon, 88, 90, 91

Practice of High Court applicable to, 91, 393

Duty of, on investigation of counter-claim, 98

No privilege to exempt from jurisdiction of, 99

Having jurisdiction to have full power, 109

In which suits may be entered and tried (see Territorial Jurisdiction), 109-120

Nearest defendant's residence, when suit may be entered in, 114

When deemed open; meaning of "open court," 152, 166

In which garnishee proceedings after judgment to be brought, 263

Where garnishee foreign corporation, 264

In which actions against foreign corporations, firms and individuals

to be brought (see Corporations), 136, 137

Power of, to enforce obedience to orders (see Powers), 90, 371

COVENANT-

Of clerks and bailiffs (see Sureties), 26-36

Form of, 403

Certificate of filing to be produced to inspector, 52

Action on, a personal action, 75

Claims on, not exceeding \$100 may be brought in Division Court. 78

CREDITORS' RELIEF ACT-

Attaching orders by sheriff or creditors, 280

Application of provisions to garnishee proceedings in Division Courts (see Garnishment), 280, 281

Provisions affecting rights of execution creditors in Division Courts (see Execution), 301-303

Provisions affecting rights of attaching creditors in Division Courts (see Absconding Debtor), 341

CRIMINAL CONVERSATION-

Action of, not maintainable in Division Courts, 54

Definition of, 72

Strict proof of marriage necessary in, 72

CRIMINAL PROCEEDINGS -

Power of Legislature as to, 41

Questions of doubt in, construed favourably to accused, 374

CROSS-JUDGMENTS-

May be set off, 303

Proceedings thereon, 303

Not to prejudice solicitor's lien for costs, 308

CUSTODY OF GOODS-

Seized under warrant of attachment, 347, 348

CUSTOM-

Questions as to, not to be tried in Division Courts, 51

Definition of, 71

Jurisdiction not ousted by setting up in certain cases, 71

Doubtful if applicable to Ontario, 71

D.

DAMAGES-

Essence of action for non-performance of duties or misconduct,

Recoverable against officers and sureties, 26-31

Action for, after prohibition granted, 64

Claims for, in personal action not to exceed \$60: 73, 75

1n replevin (see Replevin), 84

z, 16

cord. 8

ricts, 9

10

1, 12

1, 12

3

et same time

continue, 12

n senior and

rial Jurisdic-

red in, 114 166

brought, 263

d individuals

, 90, 371

DAMAGES-Continued.

In action on replevin bond, 87 Unliquidated, relief against, 88 Claims strictly for, what are, 245 For neglect to return execution, 375 For distress under defective process, 382

DEATH-

Of judge, effect on proceedings pending, 19 Of surety, procedure on (see Surety), 39 Of garnishee, before service on him, effect of, 265 Of one of two defendants after confession, 288

DEBT-

Assignments of (see Assignments of Choses in Action), 128
Definition of a, 146
Not extinguished by imprisonment of debtor, 334
Garnishment of (see Garnishment), 244, 245
Confessions of may be taken (see Confessions) 288
Jurisdiction of Division Courts in actions of (see Jurisdiction), 53
54, 73

Dest or Money Demand—

Meaning of, 146

Claims deemed to be, 146-148, 245

DEBT ATTACHMENT BOOK—

To be kept by clerks, 282

Decision-

Of a majority of members of tribunal good, 11

When decision becomes a judgment, 36

Of Judge on question of jurisdiction, effect of, 60, 61

In appealable cases to be given publicly with reasons for it, prior to certification of papers, 228

May be given instanter or postponed, 208

Statutory requirement to be observed, 208

Cannot be altered by Judge at will, 208

May be according to equity and good conscience, 73, 78

To be final and conclusive subject to right of appeal, 74, 78

See Judgment

DEED-

Action for trover of, not maintainable in Division Courts, 55

DEFAULT ---

In paying over money, liability of officers for, 27 Judgment by, when dispute note not given, 145 when defendant fails to appear in Court, 150, 166

DEFECTIVE PROCEEDINGS-

Protection of officers and others acting under, 382

DEFENCE-

In replevin against bailiff (see Replevin), 84

In actions on replevin bond, 86

Legal or equitable may be set up (see Relief), 88, 91

Of counter-claim (see Counter-Claim), 88, 91, 96-99

Involving matter beyond jurisdiction, transfer to High Court in such cases, 99

Notice of-When to be given, 146, 153

Of statutory defence or set-off sufficient, 158

Setting up on motion for speedy judgment, 153, 158

Leave to enter conditionally, 154, 161

As to one defendant and judgment as to others, 54

May be allowed at any time before judgment, 161

Notice of, in such cases to be left with the clerk and given to the plaintiff, 161

Withdrawal of notice of, 162

Payment into Court operates as notice of, 178

In garnishee proceedings, 270-273

Of no signed bill to action for solicitor's costs a statutory defence, 187

See Statutory Defence

DELEGATING AUTHORITY-

Officers appointed to fix divisions of courts cannot delegate powers,

11

Functions of Judge cannot be delegated, 18

Power of legislature in respect to, 24, 391

DEMAND-

Unnecessary before action on contract for delivery of goods, etc., 79 In replevin (see Replevin), 81, 84

DEMAND OF PERUSAL OF WARRANT-

See Officers of Court, 378, 381

DENIAL OR PERVERSION OF RIGHT-

When prohibition will be granted on, 58

DEPUTY BAILIFF-

Appointment and removal of (see Bailiff), 24, 25

DEPUTY CLERK-

Appointment and removal of (see Clerk), 24, 25

n), **12**8

risdiction), 53

s for it, prior

. 78 74, 78

ourts, 55

), 166

DEPUTY JUDGE-

Courts may be presided over by, 17
Appointment of, by Government presumed to be yalid, 19
Appointment of, by Judge, 19, 20
by Governor General in Council, 20

Powers of, 20
Death of Judge ends authority, 20
Notice of appointment to be sent to Lieutenant-Governor, 20
Duration of appointment, 20, 21
Lieutenant-Governor may annul appointment, 21

DETINUE-

Action for, maintainable in Division Courts, 55 Payment of money into court in, 55 Claim in, not to exceed \$60: 78, 75

DEVISE-

Validity of, not to be tried in Division Courts, 54, 71

DISBURSEMENTS-

Affidavit of, to be furnished to clerk, 38 False affidavit of, effect of, 191 Sec Witnesses, 189

DISCHARGE-

Of garnishee (see Garnishment), 274-277 Of debt from attachment (see Garnishment), 276

DISCHARGE FROM CUSTODY-

Of persons imprisoned on warrant of commitment, proceedings to obtain, 333

DISCRETIONARY POWERS-

Exercise of, by Judge, 5, 241, 254, 265
If exercised honestly not subject to review, 16

Where words conferring discretionary and where imperative, 15, 152, 167, 241, 254

Exercise of, by inspector, 51

How power implied in words "On sufficient grounds shewn," should be exercised, 165

See Words and Phrases.

DISCOVERY -

Rules of High Court respecting, not applicable to Division Courts,

DISCONTINUANCE OF ACTION-

How obtained in replevin, 83

DISMISSAL-

Of clerks and Bailiffs (see Clerks and Bailiffs), 22, 23

DISPUTING PLAINTIFF'S CLAIM-

Notice of, 145

Judgment by default on failure to give notice, 146

Leave to dispute may be given at any time before judgment, 161 See Notice Disputing Claim

Disputing Jurisdiction — When wages sought to be garnished (see Garnishment), 256, 257

DISQUALIFYING INTEREST-

Proceedings by officers interested irregular, 16 Effect of, in case of Judge, 18, 19 Prohibition in such cases, 59 Authorities respecting, 59

DISTANCE -

How measured, 114

DISTRESS-

Replevin of goods distrained (see Replevin), 81, 83, 85 For non-payment of fine (see Fines), 377 replevin not maintainable for goods seized under, 85 By bailiff for rent (see Landlord), 365-368

DISTRIBUTION OF MONEYS-

Realized on execution under Creditor's Relief Act (see Execution) 341

In attachment proceedings (see Absconding Debtor), 346, 347

DIVIDING CAUSE OF ACTION-

See Splitting Demands, 102-104
In attachment proceedings (see Absconding Debtor), 345

Division Courts—(see Courts)—

How to be designated, 2 Appointment of time and place for holding, 5 In cities, 6

Cost of accommodation for, 7, 8

Alterations in, how made, 10

Where proceedings continued on separation of junior from senior county, 14

Regulation of limits on such separation, 14

Clerk of the peace to keep record of time and place for holding, 16 In what courts suits may be properly entered and tried (see Territorial Jurisdiction), 109, 114, 115, 116

In which court garnishee proceedings to be entered, 263, 264 Where garnishees are corporation, 264

vernor, 20

alid, 19

71

t, proceedings to

imperative, 15,

rounds shewn,"

Division Courts,

23

DOCUMENTS-

Production of, on motion for speedy judgment, 154, 160
On subpœna duces tecum, 188, 191
When production of excused, 191, 192
Privileged communications, 192
Disposal of, on separation of county or transfer of proceedings, 14
Disposal of, on death or removal of clerk, 40
Inspection of documents of court (see Inspector), 50

DUE PROOF-

What is, 150

DUTIES OF OFFICERS-(see Clerk and Bailiff)-

Liability of officers and sureties for non-performance, 26-31 Of clerks (see Clerk), 36 Of bailiffs (see Bailiff), 41 Inspector to look to performance of, 50 Inquiry by inspector concerning, 51

E.

EJECTMENT-

Action of, not maintainable in D. C., 54, 68

ELISORS-

When practice of High Court as to, applicable to D. C., 375, 394

EMOLUMENTS OF CLERK-

Disposition of (see Clerk), 48, 49 Return of, to be made to Provincial Treasurer, 49

ENTRY OF CLAIM FOR SUIT-

In what division to be made (see Territorial Jurisdiction), 109-120 Procedure on (see Particulars), 127, 128

EQUITABLE CAUSE OF ACTION-

May be sued in Division Courts if claim within jurisdiction, 75 Action by mortgager against mortgagee for surplus, 75

EQUITABLE EXECUTION (see Receivers), 88, 90, 94, 95

EQUITY OF REDEMPTION-

Of debtor liable to seizure under execution, 314 Rights of purchaser in such cases, 314

EQUITABLE RELIEF (see Relief), 88

ESTABLISHMENT OF COURTS-

(See Courts), 11, 12

EXAMINATION-

Of witnesses on commission (see Commission), 195

When commission to take evidence of applicant granted, 199

Of witnesses aged or infirm or unable from sickness to appear, 199

Of witnesses whose attendance cannot be obtained (see Evidence), 199

Of witnesses resident at a distance (see Evidence), 203

Of defendant on motion for speedy judgment (see Speedy Judgment), 154, 160

Of judgment debtor on judgment in County Court, 313

Of judgment debtor on judgment in D. C., 320

May take place at hearing in certain cases, 334

Excess-

Abandonment of (see Abandonment of Excess), 59, 77, 78, 106, 346 Prohibition quousque may be granted where not abandoned, 59, 77, 78

EXEMPTIONS-

What articles exempt from seizure (see Execution), 299-301 Applicable to attachment (see Absconding Debtor), 336 Applicable to distress for rent, 297 Liability of bailiff for seizing, 315

EXECUTION-

Different meanings of, 293

If not issued within six years, leave of Judge necessary, 5

Leave will not be granted except within twenty years, 5

Writs of, to be issued by clerk, 38

Clerk to keep record of, 37

Bailiff to forfeit fees for neglect to return, 47

When goods seized under, repleviable (see Replevin), 80, 82, 86

When sheriff may put in claim of special property in replevin, 86

Enforcement of, when suit brought in court nearest defendant's residence, 114

Liability of bailiff for execessive seizure, 340

Enforcement of, against clerks and bailiffs, 124, 375, 376

Procedure in absence of bailiff or where required to be executed at a distance, 138

Against One of Several Partners -

How enforced (see Partners), 141

Against one of two partners, what liable, 295

What purchaser takes in such cases, 295

Such writ has no priority as to separate property over one against him as member of firm, 295

And rights of parties not affected by Creditors' Relief Act, 302

D. C.A. -- 29

roceedings, 14

160

ce, 26-31

C., 375, 394

liction), 109-120

cisdiction, 75 s, 75 EXECUTION - Continued.

What partnership property not liable, 295

Half interest in a celebrated mare held liable, 296

Against Firm-

How and against whom enforceable (see Partners), 143, 145

Issue of—

To issue when money not paid pursuant to order, 292

Formalities of, 292

Cannot issue during imprisonment of judgment debtor, 335

Not to issue within 15 days after judgment unless otherwise ordered, 211, 293

Not to be postponed more than 50 days, 215, 293

May be stayed if debtor unable to pay, 215

What deemed good cause for staying, 215

Practice in such cases, 215

Mandamus may be granted to compel issue of, 38

Cannot issue in name of plaintiff's executor without revival, 293

But if issued before, may be executed after death of either party, 293

Not to be issued without express authority, 293

Effect of endorsement for more than due, 293

If defendant pay debt, he should notify clerk, 293

Money made for one person cannot be retained to satisfy another execution against same man, 295

Farm stock transferred to debtor to be paid for by increase thereof, seizable under, 295

But not, if only lent, 295

Where goods deemed debtor's so as to be liable to seizure, 295

Liability for fraudulent removal of goods, 295

Purchaser of crop sold under, may levy trespass in respect of it, 295

Effect of sale after expiry of, 295

seizure by bailiff when sale after removal from office, 296

No warranty of title at sale under, 296

Issuing too soon, an irregularity only, 296

Cannot be renewed nunc pro tune, 296

When expired, cannot be renewed, 296

Where execution creditor, through a stranger, entitled to move to set aside, 296

Where discharge in insolvency an answer to issue of, 296

Terms fieri facias and execution, convertible terms, 296

Seizure to be made according to priority, 293, 294

What deemed irregularities in, 294

Binds goods from time of seizure, 294

Money and securities bound only from time of seizure by sheriff or bailiff, 294

EXECUTION—Continued.

What may be seized under, 294, 295, 314, 315, 340

Equity of redemption in vessel not saleable under, 294

Nor fixtures in defendant's house, 294

Tenants' fixtures may be removed, 294

Growing crops are seizable, 294

Shares, etc., in companies are not, 296

Nor growing fruit, 296

How chattels of mortgagor may be seized and sold, 294, 295

The right to a foal of a mare would follow the dam, 296

The identical money of debtor in third person's hands liable, 299

Liquor license cannot be sold under, 295

Book debts not seizable under, 288, 295

Bailiff, after taking possession, may bring trespass or trover, 206

Or insure against fire, 296

Goods sold may be lent by purchaser to debtor, 296

The acts of person assisting bailiff are those of the latter, 296

Bailiff can make no contract of sale until seizure, 297

Interest not recoverable on judgment paid independently of, 297

Stranger may be appointed to execute warrant against bailiff, 394

Where to be executed, 304

Must be executed within the county, 304

Effect of attempt to execute out of county, 304

Abandonment and Priority of, 297

Effect of sale by debtor after abandonment, 297

Chattel lent by sheriff not abandoned, 297

What is and is not abandonment, 297

Long delay not of itself abandonment, 298

Bailiff who has withdrawn may re-seize if writ in force, 298

Distinction between rights of subsequent execution creditor, and of purchaser from debtor after abandonment, 298

or purchaser from deotor after abandom

Effect of instructing delay in levy, 298

If bailiff notified not to execute priority lost, 298

Rights of sheriff as to goods under seizure by bailiff, 298

Enforcement by bailiff without authority, 298

Effect of allowing debtor to retain possession on acknowledgment of seizure by him, 297

Temporary absence not abandonment, 299

Court will inquire at what period of the day writ issued, 296

Writ has no priority over attachment in same D. C., 341

Effect of attachment on rights of execution creditors, 342

On Transcript from Another Division, 306

Clerk to notify plaintiff of return of nulla bona, 307, 308

Effect of absence of registration certificate of mailing notice, 307,

May issue on revival of judgment by personal representative of deceased creditor, 308

143, 145

292

ebtor, 335

herwise ordered,

out revival, 293 of either party,

o satisfy another

increase thereof,

seizure, 295

s in respect of it,

al from office, 296

ntitled to move to

ie of, 296 ns, 296

ns, 296 4

eizure by sheriff or

EXECUTION-Continued.

Date Of-

To be day of issue, 308

Return Of-

To be returned within 30 days, 308 Computation of time, 308 Effect of return of "money made," etc., 297

Duty of bailiff as to, on appeal in interpleader, 221

Of Nulla Bona, what is, 310

May be made after expiry of writ, 310, 311 Notice of, on execution issued on transcript, 307 Bailiff not entitled to mileage on, 305 Effect of, where there are goods, 297, 311 Effect of, on transcript to County Court, 310

Action for neglect to return, 375

Renewal Of-

May be renewed by clerk from time to time for 6 months, 308 How time computed, 308

Not necessary when acted upon, 308, 310

Cannot be, after expiry, 308

Effect of sale of his goods by debtor in such cases,

Clerk not to renew without authority, 309

Effect of unauthorized renewal, 309

Ratification thereof by creditor, 309

County Attorney may renew in certain cases, 309

Immediate Execution-

May be ordered by Judge, 309 Application and affidavit therefor, 310

Mortgagor's Interest in Goods-

May be seized and sold, 314

What property passes by, 314

An indivisible interest in chattel may be sold, 314

Effect of such sale, 314

Rights of vendee in such cases, 314

Moneys and Securities for Money -

What may be seized under 314, 315, 316

Bailiff cannot sell security seized, 315

To hold securities for benefit of plaintiff, 316

Bailiff may sue thereon and recover in name of plaintiff, 31

Procedure in such cases, 315, 316

Rights of parties to such action, 315, 316

Defendant in original suit not to discharge action, 317

Party desiring to enforce payment to pay or secure costs, 317

Disposal of money recovered, 317.

Indorsement on after seizure to be made by bailiff, 317

EXECUTION-Continued.

Notice of Sale, when and how given, 317, 318

Effect of irregularity in, 318

Must be signed by bailiff himself, 318

Requisites of, 318

Against Corporations (see Corporations)

If issued after winding up order, void, 319

Proper remedylin such cases, 319

Against Married Women, (see Married Women), 401

Sheriff may Intervene, 319

When and under what circumstances sheriff entitled to goods seized, 319

Bailiff's fees in such cases to be paid by sheriff, 319 would not include poundage, 319

If no demand by sheriff, bailiff may sell, 319

Sale of Goods Under-

When to be made, 318

Duty and liability of bailiff in respect of, 318, 319

Person taking goods seized, without authority, guilty of felony 319

Sale by Consent, 318

When and in what manner statutory requirements may be waived by defendant, 318, 319

Bailiff or other officer not to purchase goods sold, 320

Effect of sale to such officer, 320

Exemptions-

Articles exempt from seizure, 299, 300, 301

Setting Aside-

What are and are not grounds for, 301 By whom application may be made, 301

Costs-

Plaintiff entitled to execution for, 301

Creditor's Relief Act-

Provisions affecting rights of execution creditors in Division Courts, 301

Priority among execution creditors in High Court and County Courts, 301

Proceedings by subsequent creditors on levy by bailiff, 301

Debtor and other creditors may contest bona fides of claims, 301

Proceedings where creditor has recovered judgment in D. C., 301

Proceeds of execution paid by debtor or mortgagee not distributable under, 302

Only creditors who are parties, share in benefits of interpleader issue, 302

Rights of firm or separate creditors of partnership not affected by,

nonths, 308

intiff, 31

317 costs, 317 EXECUTION-Continued.

Intervention by sheriff under (see supra), 302, 319

Enforcing Division Court Claims-

Proceedings on failure of sheriff to realize money on any D. C. claims filed with him, 302, 303

Cross Judgments-

May be set off (see Cross Judgments), 303

On removal of Judgment Debtor-

May be obtained on production of certified copy of judgment, 304 Payment or tender may be made to clerk or bailiff before sale, 304

Effect of, 304, 305

When payment made to creditor, defendant should notify clerk, 305

Execution completely executed by, 297

Fees of Bailiff-

Where goods in his possession are taken by sheriff, 303

Where satisfied in whole or in part after seizure and before sale, 305

See return of nulla bona, supra, 305

On Judgment against Garnishee-

To be stayed till money due, 276

In Attachment (see Absconding Debtor)-

Property attached may be seized and sold under, 345

If debtor does not appear, 350

If summons served personally, 350

EXPERTS-

Evidence of, not to be taken under commission, 196

EXECUTORS AND ADMINISTRATORS-

Statutes of Limitations applicable to (see Limitation of Actions)
187

EXECUTOR DE SON TORT-

Action may be revived against, 308

EXPRESS COMPANY -

Having head office out of Ontario, service of process on, 137

EXTORTION-

Definition of, 373

Penalty for, 374

EVIDENCE-

Entries in books of public nature, 16

· Certified copies of officer's covenant to be, 32

Entries in books of clerk and bailiff to be, 32, 37

Entries in procedure book and certified copies thereof to be, 37

E VIDENCE -- Continued.

Effect of procedure book not being signed, 37

Where entry in procedure book held not to be evidence of judgment in replevin, 37

On inquiry by inspector into conduct of officers, 50, 51 inspector should take notes of, 51

Prohibition will not be granted for improper reception or rejection of, 60

Necessary in action on contract, 110

Only admissible as to matters contained in particulars, 128

To be taken down in writing in appealable cases, 164, 165

unless agreement not to appeal, 165 Effect of absence of notes of, in appeal, 165, 220, 228

When in existence must be certified to Court of Appeal, 221

Of acknowledgment to take claim out of statutes of limitations, what sufficient, 182

Of part payment for same purpose, 185

Of set off, not to be received except such as contained in particulars, 187

Of witness whose attendance at trial cannot be obtained, 199

Judge may oppoint suitable person to take, 199

Copy of order and notice of time and place to be served, 199, 200 201

Effect of failure to give notice, 202

How evidence to be taken, 199, 203

Return of, to be made to clerk, 199, 203

When evidence so taken receivable, 202, 203

Costs of order and examination, 199, 203

Circumstances under which order for, may be granted, 199, 200, 201

How and when application should be made, 200, 201

Affidavit for, what to contain, 201

How order framed, 201

Disobedience to order, how punished, 201

When order may be made for examination of witness going abroad, 201

How evidence to be taken, 202

Powers and discretion of examiner, 202

Objections to evidence (see Commission), 197, 202, 203

Examiner cannot delegate his authority, 203

Depositions may be used at trial saving all just exceptions, 197, 202

Of witness resident in remote part of Province, 202

Order may be made appointing person to take, 203

Circumstances under which order may be made, 204

Application and affidavit for order, 204

How evidence to be taken and returned, 204

on of Actions)

on any D. C.

judgment, 304

d notify clerk.

nd before sale.

e sale, 304

303

on, 137

ereof to be, 37

EVIDENCE-Continued.

Rules of High Court to apply to commissions, 204 Consolidated Rules applicable, 204-206 (See Commission to Take Evidence, 195)

Books of Account-

To be received as evidence in certain cases, 207
Affidavit or Affirmation—

May be received in evidence in certain cases, 207
Improper Admission or Rejection of, 218
Must be objected to at trial, 218
New trial on ground of (see New Trial), 213

F.

FALSE PRETENCES-

Offence of, what is, 327

FALSE RETURN-

By bailiff, penalty for making, 375, 376

FALSE STATEMENT OF FACTS-

Judgment obtained by, invalid, 4

Forfeited, disposal of, 47

FALSE IMPRISONMENT-

Action for, not prohibited in D. C., 69, 71

No question of title can arise in, 69

Prohibition will not lie because judge considered question of malicious prosecution in action for, 60, 71

FEES-

For clerk of the peace on filing officer's bond, 31 Clerks and bailiffs to be paid by, 44 To be paid to appraisers, 44 Table of, to be hung up in clerk's office, 44 To be paid in advance, 45 Effect of giving credit for, 45 May be deducted by clerk from money coming into his hands, 45 But not if money belongs to another, 45 Bailiff cannot withhold moneys collected by him for, 45 How payment of, enforced, 45 Notice to debtor must be given in such cases, 45 Proceedings on motion for order to enforce payment, 46 Of bailiff to be paid to clerk before execution issued, 46 Bailiff's lien for, when action settled or defendant makes an assignment, 46 Bailiff to forfeit, for neglect to return execution, 47

FREE-Continued.

None to be received by officers execept those provided for by tariff, 47

And emoluments earned by clerk, disposition of, 49

Duty of inspector regarding, 50

Tariff and statute prescribe all lawful fees, 50

In replevin, how fixed, 84

Of clerk on transferring suit to another division, 122, 123

Postage of papers to be costs in the cause, 138

Payable on requisition for jury, 234

for sustenance of jury fund, 242 return of, 242, 243

Of jurors (see Jurors), 248

Of arbitrators (see Arbitration), 286, 287

Of bailiff when goods seized are taken by sheriff, 303

Of bailiff when execution satisfied after seizure, 305

On distress for rent claimed by landlord, 368

Of witnesses (see Witnesses), 189-195

to be taxed by clerk, 38

of successful defendant need not be paid by money deposited by plaintiff for costs, 45

FINES-

Clerk to keep account of, 38

To furnish county attorney with verified account of, 39

Disposition of by county attorney, 387

How enforced in Division Courts, 377

How enforced by justices of the peace, 377

FIRM-(see Partners)

Members of, may be sued separately in certain cases, 140, 141
Bailiff may seize property of, on certificate of Judge, 141
May sue or be sued in name of, 142, 144
Judgment and execution against, 143, 145
Adding partners as defendants, 143
Garnishee proceedings against (see Garnishment), 246

Foreign-

Service of process on, 136-138, 144, 145
May be reached by garnishee process (see Garnishment), 247

FLOODING OF LAND-

Action for may be tried in Division Courts though title in question where sum claimed does not exceed \$20: 70

Division Courts may grant injunctions to restrain, 92

FOREIGN CORPORATIONS-

Where action may be brought against, on cause of action arising in different divisions, 116

tion of mali-

hands, 45

makes an

FOREIGN CORPORATIONS-Continued.

Service on (see Service), 136, 137
Chief place of business of, 137
Debt in hands of resident agent of, may be attached, 247
Cannot be reached in High Court by garnishee process, 247
When liable to garnishee process in Division Courts, 259, 260
Service of garnishee summons after judgment upon, 264
In what court such summons issuable, 264
See Corporations

FOREIGNERS-

Action against (see Jurisdiction), 134-137

FOREIGN JUDGMENT-

Action on, may be brought within six years, 5 Effect of personal service in action on, 132

FORFEITURE OF OFFICE-

By clerks and bailiffs failing to give security (see Sureties), 33, 34 On conviction of extortion, 374

FORMAL DEFECTS-

Proceedings not to be set aside for, 299
Protection of persons acting under, process containing, 383

FORMS-

Substantial compliance with sufficient, 27, 377
Of judgment for balance of unsettled account, 106
Judge may prescribe in garnishee proceedings, 282
May be varied according to reason and common sense, 378
Of memorandum to be indorsed on garnishee summons in wages cases, 258

Of memorandum to be indorsed by bailiff on inventory of goods seized under attachment, 344

Of conviction for offences under the Act, 378

Of covenant of clerk or bailiff, 403

FORTHWITH-(see Words and Phrases)

Definition of, 16

FRANCHISE-

Action for, not maintainble in Division Courts, 54 Definition of, 71 A patent is, and action as to cannot be tried, 71

FRAUD-

Judgment obtained by, invalid, 4 Goods obtained by, may be replevied, 83 Or breach of trust, offence of, 326, 327

FRAUDULENT CONVEYANCE-

Cannot be attacked by creditor under \$40: 311

FREEHOLDERS-

Officers' sureties must be, 26 Who are, 30, 225

G.

GAMBLING-

Money lent for purpose of, not recoverable, 65 Definition of, 66 Games held to be, 66

GAMBLING DEBT-

No jurisdiction in action for, 53
Definition of, 65
Action on a wager maintainable in England, 65
What has been held to constitute, 65, 66
Transferror of a note for value after maturity cannot set up defence of, 65
Agreement in nature of a bargain, but really a bet invalid, 65
Agent employed to bet may sue for, 65
Money paid to discharge lost bet recoverable, 65
And so is money lent to pay a lost bet, 65
But not money lent to play illogal games, 65
Nor money lent but not used for gambling, 65
Liability of stake-holder for money in his hands, 66

GAOLER-

Duty of, as to prisoner committed under warrant, 332, 333

GARNISHMENT-

Application for prohibition in (see Prohibition), 62 Substitutional service of process in (see Substitutional Service), 133-136

Application for new trial in, may be made after expiration of 14 days, 212

Garnishee not a "party to a cause," 217

Appeal in (see Appeal), 216

Garnishment of Debts-

Conditions precedent to right of, 244

Debt or money demand within competence of D. C., 245

Claims strictly for damage not subject of, 244

what are, 245

ies), 33, 34

383

47 8, 217

59, 260

878 s in wages

y of goods

As to proceedings against non-resident garnishees (see Corporations), 259, 260

The Debt-

Principle of what is a debt illustrated, 245

May be legal or equitable, 245

Claim of primary debtor must be "due and owing," that of garnishee "due or owing." 245

Distinction considered, 245, 246

Present right to sustain action against garnishee unnecessary, 246-

Mere possibility of defence no ground for ousting, 246

Rule of High Court respecting, not applicable, 246

Debts Attachable-

Test of, 246

Recovery of judgment does not affect it, 246

Debt for which cheque has been given, 246, 251

Money deposited for special purpose which has failed, 246

Debts, legal or equitable, whether presently payable or not, 246

Moneys which may or may not be payable by trustees, not debts,

When trustee may be liable in such cases, 246

Debts due by executor to judgment debtor, 246

What order in such cases should shew, 247

Debt to administrator not attachable for private debt, 247

Taking debtor in execution does not prevent, 247

Rent due by virtue of Apportionment Act, 247

Money in hands of agent of foreign garnishee, 247

Judgment or order for costs sufficient to sustain, 247

Cases which have been held to be debts and attachable, 247

Debt due by company in liquidation, how reached, 248

Money in hands of a receiver, how attached, 248

Verdict attachable before judgment, 248

Amount fixed by award, 248

Surplus proceeds of mortgage sale, 249

Claims not Attachable-

Claims held not to be debts and not attachable, 248-251

Money taken by police from a prisoner, 248

Contract to loan money creates no debt, 249

Where debt based on illegal consideration, 250

Money in hands of Government, 250

Lien of garnishee must be discharged, 250

Money payable by county to Clerk of the Peace, 250

Money lodged by executrix de bonis, etc., in bank of attaching creditor, 251

Claim for unliquidated damages referred to arbitration, 251

Where cheque given and duly paid, 251

Corpora-

at of gar-

ssary, 246.

ot. 246

not debts.

ttaching

GARNISHMENT-Continued.

Drawer of cheque not bound to stop payment, 251 Debt owing to two not answerable for claim against one of them,

Life interest of tenant by courtesy in purchase money, 251

Assignee of book debts cannot proceed summarily by garnishment.

Clients moneys deposited in his own name by stock broker, 252

Judgment will be set aside if it appears debt was assigned, 252

Right of cestui qui trust to object to order, 252

Protection of trust moneys, 252

Such money must be property of debtor absolutely, 252

Against Partners-

Names of individual members of firm must be set out, 246

Parties to proceedings against, 246

Judgment against partner served, 246 Effect of partner served not objecting to proceedings, 246

Rights of Other Parties-

Cannot be violated, 251

Assignment in insolvency prevents, 251

Order on garnishee, effect of, 251

Effect of assignment of verdict, 251

Notice of assignment, not necessary, 251

When person may be made party to, 251

Rights of bondholders in Railway Company, 251

After appointment of receiver a contempt, 251

Appointment of receiver after attachment, effect of, 251

Assignee of debt may waive his rights, 252

Protection of garnishee in such cases, 252

Procedure when it appears that money belongs to third person, 252

Solicitors Lien for Costs-

Effect of, with respect to attachment, 252

Notice of, must be given to garnishee, 252

Effect of notice, 252

Proceedings thereon, 252, 278

Wages or Salary-

To be exempt to extent of \$25: 253

Persons entitled to exemption, 258

Cases in which exemption not allowed, 253, 254

When debt contracted for board or lodging, 254

When not necessary for support of debtor's family, 254, 255 When debtor unmarried and has no family dependent on him, 254,

Effect of provision and statutory exceptions considered, 254, 255

Notice Disputing Jurisdiction in such Cases, 256

When, and in what manner given, 256

Is an indispensable requisite to proceeding, 256

When provision as to notice is applicable, 257

Effect of absence of clerk preventing notice, 257

Omission of clerk to perform duty, 257

Effect of notice, 256, 257

Memorandum on Summons in such Cases, 257

Pre-requisites of, 257, 259

Effect of absence of, 258

Form of memorandum, 258

Applies to all cases whether before or after judgment, 258

After Judgment-

Attaching order may be granted on judgment, 259

Proceedings by attachment only when judgment recovered, 259

Assignee of judgment may proceed on, 259

Affidavit for, 259

Prohibition not obtainable on defective affidavit, 259

Scope of attaching order, 259

Garnishee must be resident in Ontario, 259

Unless having an agent with office as such in Ontario, 260

Company having chief place of business out of Ontario not affected by, 260

Service of Attaching Order, 260

Effect of, to bind all debts, etc., 260

How made, 260

Substitutional service cannot be ordered, 260

Upon a foreign company, firm or individual, 260

Who deemed "agent" in such cases, 260

Effect of Attaching Order-260, 261.

Binds "debts" only, 260

Claims bound by, 260-262

Effect of payment by garnishee of claim not a "debt," 259, 260

Rights of debtor before order to pay, 261

Duty and liability of garnishee after service on him, 261

When payment into court will discharge garnishee, 261, 262

Until order to pay, creditor has no judgment against garnishee.

After judgment, garnishee liable to judgment summons, 261

Garnishee proceedings only collateral to action, 262

Effect of assignment by garnishee, 262

Debt not garnishable by creditor of primary creditor, 262

How garnishee should proceed, 262

Where several orders, how creditors rank, 262

Order gives no right to securities, 262

Payment to any but p imary creditor void, 262
Effect of payment under compulsion of law, 262, 263
Money paid to debtor after garnishee not recoverable, 263

Summons to Garnishee, 263

Primary creditor may summon garnishee, 263 From what division summons may issue, 263 What memorandum endorsed to show, 263 When returnable, 263, 264

Joint Garnishees-Service on, 263

Service on foreign corporations, 264 Mode of service, 265

Judgment at Hearing-

What "hearing" includes, 266

Claims must be proved, 266

Where some parties are served and some not, 260

Where suggestion made of claims of other persons, 266 Rights of garnishee as to lien or set-off, 267

Or when debtor bound to indemnify him against other claims, 267

Effect of cross-claims or counter-claims, 267

Effect of set-off against judgment creditor, 267

Judgment against, may be set off, 267

What debts subject of, 267

Cost of judgment included, 267

Form of judgment when debt not due, 267

Where Primary Creditor's Claim not a Judgment,

Summons to issue, 267

Court in which proceeding to be taken, 267

When returnable, 267

When garnishees not resident in Ontario, 268

Who deemed agent in such case, 268

Service of, 268, 269

judge may dispense with, 268 effect of provision, 269

Judgment in such Cases,

What judgment to be given, 269

Debt due by garnishee and primary debtor to be proved, 270, 273

Against garnishee and debtor may be separate, 270

Final judgment against debtor necessary, 270

Subject of appeal in appealable cases, 216, 270

Married women subject to, 270

Provisions as to speedy judgment not applicable, 270

General Provisions, 270

All parties interested may shew cause and set up any defence, etc., 270, 272

Application of this provision, 272, 278

58

ered, 259

260 not affected

ot,'' 259, 260

1, 262 t garnishee.

s, 261

262

Set-off would be a defence, 212

Grounds for not paying over, 272

Primary debtor or garnishee may set up statutory or other defence, 271

Or admit liability in whole or part, 271

Particulars in such cases to be filed with clerk, 271

Notice of, to be sent by clerk to other parties, 271

How primary creditor should proceed on receipt of notice, 271

Effect of omission by such parties to give notices required of them, 271, 273

Costs of notice to be costs in cause, 271, 273

Proceedings at hearing, 272

Duty and liability of garnishee when cause exists why debt should not be paid, 272

Remedy of third party where money paid to primary creditor, 272 How claimant should proceed, 273

Service of summons to bind debts until hearing, 273, 274

Effect of adjournment of hearing, 274

Payment into court may be made, 273, 274

When such payment does not protect garnishee, 274

No payment to be made by garnishee to primary creditor before judgment against debtor, 274

Judgment where primary creditor has assented to payment to another, 274

Execution not to issue until garnishee's debt due, 276

Judgment not to be given until summons and memorandum with proof of service filed, 276

After Judgment-

Debts to continue bound, 274, 275

Payment by garnishee to discharge claim of debtor against him, 274

Discharge of Garnishee-

Effect of payment made under order of court, 274, 275

Costs. 275

Liability of garnishee for, 275

Of primary creditor, how payable, 275

Application to Discharge Debt from Attachment-

Who may apply for order, 276

When order may be made, 276, 277

What amounts to payment, 277

If money paid restitution not enforceable, 277

Protection of garnishee paying in ebedience to legal process, 276, 277

Security from Primary Creditor-

When security may be ordered, 277, 278

Nature of security to be given, 278 Action on the bond, how and where to be brought, 278, 354 Effect of payment of amount before action, 278

Adverse Claims-

Adjudication upon, 278, 281, 282 How jurisdiction limited on, 279

What questions subject of, 279

When claim may be adjudged void, 279

Proceedings necessary in such cases, 279, 281, 282

Transactions prior to debt not affected, 279

Assignee for benefit of creditors not entitled to money garnished,

Remedy where debtor harassed by conflicting claims, 282

Right of sheriff under attachment issued against debtor, 279, 281

Rights of sub-contractor in respect of asbts due by contractor, 279

The Creditor's Relief Act, 280

Attaching orders by sheriff or creditor, 280

When provisions become operative, 280, 281

If attachment proceedings complete and money paid over, sheriff has no right, 281

Or if paid in and out of court before levy, 281

If not paid out, rights of attaching creditor not clear, 281

Proceeds of garnishment in court to be paid to sheriff for distribution, 279, 281

Effect of provisions, 281

Proceedings by sheriff applicable only to debtor in his own county, 281

Adjournment-

Power of Judge to postpone proceedings, 282

New trial may be granted under, after fourteen days, 282

Debt Attachment Book, 282

To be kept by clerk, 282

Entries to be made in, 282

Copies of entries may be taken by any one free of charge, 282

When entries receivable in evidence, 283

GENERAL RULES AND ORDERS-

Authority of board of County Judges to frame, 389, 390, 391 Proceedings of board, 392 To be certified by board to High Court, 392 To be approved of by Judges of the High Court, 392 Effect of, when approved, 392 Judges to transmit copies to Lieutenant-Governor, 392.

Power of Legislature with respect to, 392

See Board of County Judges

D.C.A.-30

reditor, 272

274

ice, 271

ed of them,

debt should

her defence,

ditor before payment to

ndum with

gainst him,

госевя, 276,

GENERAL SESSIONS-

Justices in, may certify to Lieutenant-Governor for regulation of number of sittings in certain cases, 91

Notice and proclamation to be made in before alteration in divisions, 10, 11

Notice and proclamation in, in case of separation of county, 14, 15

GOODS-

Account settled by part payment in, not matter for prohibition, 60 Where contract payable in, Judge may order payment in money, 79

Title to, cannot be acquired by purchase in public market, as against owner, 83

When obtained by fraud, innocent purchaser of protected unless vendor convicted of false pretences, 83

Replevin of, (see Replevin), 82, 84

Identification of, in replevin, 84

Liable to execution (see Execution), 293, 315, 336, 340

Equity of redemption of mortgagor in, liable to execution (see Execution), 314

Rights of purchaser in such cases, 314

GROWING CROPS-

Subject to interpleader, on claims of mortgagee, 70 Deemed goods in replevin, 84

GUARANTEE COMPANY-

May be surety for officers, 26

GUARDIAN AD LITEM-

To be appointed in action against lunatic, 135

H.

HABEAS CORPUS-

For attendance of witness confined in gaol, 191 When appellate court will review committal on, 372

HEARING (See Trial)

Every subject of Her Majesty entitled to, 36, 265 Judge may adjourn, 167 On summons to garnishee in attachment proceedings, 266 What included in, 266

HEREDITAMENTS-

Action for not maintainable in D. C., 54 Definition of, 70

HIGH COURT, (see Rules of High Court)

Rules of as to procedure, not applicable to D. C., 91, 92 Principles of practice may be followed in certain cases, 91, 393 egulation of

ion in divi-

ounty, 14, 15

ohibition, 60 in money,

market, as

ected unless

ecution (see

eguiation of

Transfer of action to, where defence involves matters beyond jurisdiction, 99

HIRE OF GOODS-

HIGH COURT-Continued.

Replevin of goods in default of payment under terms of hire receipt (see Replevin), 82

HOLIDAY-

Days included in, 21

Judgment entered on, may be questioned, 21

Service on, good, 157

but not on Sunday, 157

When last day for giving security in appeal falls on, may be given on following day, 224

HOSTILE WITNESS-

Examination of (see Witness), 191

HOTEL-

Sitting of court not to be held in, 7

HOUSEKEEPER-

Who is a (see Appeal), 225

HUSBAND AND WIFE (see Married Women)-

A receiver may be appointed of husband's interest in lands of wife dying intestate, 247

I.

ILLEGAL PROMMISSORY NOTES-

Action for, not maintainable in D. C., 53, 68 See Jurisdiction

ILLNESS OR ABSENCE OF JUDGE-

Who to preside in case of, 19

IMMEDIATE EXECUTION-

Judge may order (see Execution), 309

Infant-

Cannot be surety, 27

Not bound by fraudulent representation as to age, 27

May sue for wages in D. C. up to \$100: 99

Not restricted from suing for other matters, 99

In suit for other matters, next friend necessary, 99

Effect of contract with parent, 100

Cannot be common informer, 100

Wages earned by, belongs to himself, 100

Effect of Statutes of Limitations in case of, 181

266

, 91, 393

Injunctions-

Provisions of Judicature Act respecting, 88 Power of Division Courts to grant, 90

Enforcement of, 90

In what cases issuable, 92

Undertaking as to damages on application for interim order, 93

Damages on, 93

Effect of death of defendant, 98

Mandatory-

Definition of, 98

When granted, 93

Breach of-

Remedy for, 98

Person assisting, is liable, 93

Discharge of party committed for, 93

Costs, 93, 94

IMPRISONMENT-

Of debtor under warrant of commitment, 332

How time computed, 333

Not to extinguish debt, 834

INSPECTOR OF DIVISION COURTS-

To join in alteration of limits of Division Courts, 10

On separation of junior from senior county, to join in appointment of courts, 12

To join in regulation of limits on separation of a county, 14

Record of alterations to be sent by clerk of the peace to, 16

On report of, clerks and bailiffs may be dismissed, 23

May grant leave of absence to clerk or bailiff, 24

To approve of appointment of deputy, 24

Power of legislature to appoint, 24

To have access to clerk's accounts of suitor's moneys, etc., 38

Appointment of, 50

Duties of, 50

To make personal inspection of courts, 50

To see that proper books are provided and kept, 50

That duties of officers efficiently performed, 50

When directed by Lieutenant-Governor to ascertain that proper security given, 50

To report on all matters to Lieutenant-Governor, 50

May institute enquiry into conduct of officers, 50

Power to take evidence and summon witnesses, 50

May compel production of documents, 51

Scope of powers and discretion on such inquiry, 51

How discretion to be exercised, 51

Clerks to produce books and documents for inspection, 51

INSPECTOR OF DIVISION COURTS -Continued.

Clerk or bailiff to report to, when required, 51

To be informed by officer of appointment, 52

And of change of sureties, 52

May require officers to produce certificate of filing bond, 52

Annual returns to be made by clerks to, 53

INSURANCE-

Actions on premium notes of, where to be entered and tried, 115 Appeals in mutual insurance cases (see Appeal), 217

INSTALMENTS-

Judgment may be ordered to be paid by (see Judgment), 211

INTEREST, (see Disqualifying Interest)

Of officers in proceedings, 16

Of Judge, 18, 19

Prohibition where Judge interested, 59

INTEREST OF MONEY-

On judgments of Courts of Record, 4, 211

On judgments in Division Courts, 4, 55, 211, 297

Should be claimed in particulars, 147

Unless over 6 per cent. rate need not be stated, 147

Interest by statute, 209, 210

When recoverable-

On debts, 209

On implied contract to pay, 209

On partnership accounts, 209

By surety, 209

By agent on advances, 209

On breach of agreement, 209

On account stated for money lent, 209

Or between merchant and merchant, 209

On award for sum certain, 209

On money improperly retained by sheriff, 209

Or improperly used by agent, 209

Where recovery sought against estate only, 210

On arrears of annuity, 210

When Not Recoverable-

Money due on account stated, 209

On agent's accounts, 210

Computation of-

Time from which recoverable, 210

On debts, certain and overdue, 210

On demand, 210

By way of damages in troopass or trover de bonis asportatis, 210

pointment

rder, 93

7, 14

, 16

tc., 38

hat proper

51

INTEREST OF MOREY-Continued.

On policies of insurance, 210

Bills and notes, 210

On verdict, 211

Need not be claimed nor special damage laid, 210

Compound, not allowed except on express or implied contract, 210

Rate of-

On various debts and contracts, 210, 211

Excessive rate paid after maturity not recoverable back, 211

Rate chargeable by banks and other companies, 211

Appropriation of Payments-

Effect of payment not specially appropriated, 211

INTERPLEADER-

Not removable by certiorari, 107

Appeal-

Evidence need not be taken in writing, 165

When appeal will lie (see Appeal), 217, 221, 222, 364

Agreement not to appeal, 166

Jury-

Issue in, may be tried by (see Jury), 233

Conditions on which right to jury depends, 233, 234

The Issue In-

Question to be tried, 233, 360, 361

Onus of proof—when claimant in possession, 233, 358

when stranger in possession, 358

Creditor may shew claimant has no title, 233, 35%

Action not removed from control of . our 360

Debtor harassed by conflicting 4 .ee claims may apply for,

282

Only creditors who are parties to share benefit, 802

Claims of landlord and others in respect of goods seized, 355, 356

Claim-

How adjusted 356

What claim must be, 357, 358

May be brought before action, 357

When bailiff cannot bring, 358

When bailiff should apply, 358

The Crown cannot claim in, 358

Goods passed to assignee, effect of, 358

Possession by claimant prima facie evidence of title, 358

Parties to, 359

Applies to foreigner, 359

Growing crops, subject of, 359

Goods seized under revenue laws, 359

Security to bailiff, 359

INTERPLEADER-Continued.

Trespass may be brought pending, 859
When more goods seized than claimed, 359
Ratification by creditor of bailiff's detention, 859
Withdrawal from possession, effect of, 359
Abandonment, liability of bailiff for, 359
Goods to be seized before application for, 360

Indemnity-

Bailiff not bound to accept, 358 effect of acceptance of, 358

Proceeds or Value of Goods-

When interpleader may be brought for, 860

By Landlord for Rent-

Landlord's claim for rent, when bailiff should interplead, 360

Application for-

Practice as to, 360

Form of, 860

Names of all creditors must be given, 357, 364

Omission offcreditors, effect of, 364

Execution creditor not liable for seizure, 361

Authority of solicitor as to, 361

Cases in which adjudication to be made, 361

Stay of Proceedings

When actions respecting the subject matter may be stayed, 356 Regularity of proceedings not to be inquired into on application for stay, 361

When action of replevin for same goods will be stayed, 361

Crder of Judge, effect of, 361

Costs of proceedings, 361, 362

Proceedings-

Several executions or attachments, 357, 364

In High Court, duty of sheriff as to D. C. creditors, 364

Effect of interpleader summons, 364

Right of bailiff to counter-claim in action for damages, 364

Jurisdiction-

On summons from wrong court, Judge has no jurisdiction, 362

New Trial—

When application must be made, 357, 363, 364

Effect of omission to move for within proper time, 362

Who may apply for, 364

Terms of granting, 364

Adjudication-

Judge must adjudicate in proper cases, 356, 362

Decision cannot be altered by Judge, 361

Damages-

Judge may try question of, to any amount, 364

apply for,

ontract, 210

k, 211

d, 355, 356

INTERPLEADER—Continued.

What claims for damages included, 363 Claim for, to be stated in issue, 363 Effect of adjudication on other questions only, 363 Stay of proceedings in actions for, 363 What recoverable, 363

Protection of Bailiff-

Effect of interpleader proceedings, 363 Cases in which brilliff entitled to, 363

INSOLVENT-

Surety becoming, new bond to be filed by officer, 33 Meaning of, 32 When goods of, may and may not be replevied from assignee, 80, 82

INTOXICATING LIQUORS-

Action for, not maintainable in D. C. when drunk in tavorn, etc., 58 Nor for notes given therefor, 58

IRREGULARITY-

In proceedings not subject of prohibition, 60 In service of summons, effect of, 131, 132 Waiver of, 131, 132

J.

JOINT DEBTORS (see Partners) -

Judgment against one, bars claim against others, 3, 140 rule applicable to married women, 4 cannot to set aside, to evade rule, 140

Release to one, releases all, (see Sureties), 29

Contribution by (see Sureties), 30, 141

Assignment of judgment to judgment debtor, when compellable, 141
On motion for speedy judgment against, judgment may be ordered
as to some, and others allowed to defend, 154

When party may be added as defendant (see Adding Parties), 142

JOINDER OF CAUSES OF ACTION-

(See Combining Causes of Action), 74, 78

JUDICATURE ACT-

Provisions as to Equitable Relief (see Relief), 88, 89
See High Court—

JUDICIAL OFFICERS-

Excess of jurisdiction by, 18 Omissions by, do not invalidate proceedings, 13 JUDGE-

Appointment of, 17 When courts to be held by, 5 May alter time and place of holding, 5 Discretion of, 5

Discretion of, 5 may be compelled by mandamus to exercise, 5 May apportion cost of accommodation in certain cases, 7 With sheriff, etc., to appoint and alter divisions, 10 To notify others of application to change divisions, 10 Establishment of courts by, 11 Appointment of divisions on separation of county, 12-17 Decision of, when a judgment, 13 To preside over courts, 17 Appointment of Junior Judge not to excuse, 17 Junior or deputy Judge may preside, 17 Not answerable for erroneous judgment, 17, 18, 54 Responsibility where jurisdiction wanting, 17 Liability of, generally, 17-19 Entitled to notice of action, 18 No liability, when jurisdiction not apparent, 18, 54 Acts beyond limit of authority, liability for, 18, 54 Words spoken by, at trial, not actionable, 18 Disqualified from acting by interest, 18, 19, 59 Judicial acts alleged to be done maliciously, not liable for, 18 Signature of, what requisite, 18, 31 Functions not to be delegated, 11, 18 Private communications to, improper, 19 Attachment against for disobeying certiorari, 19 Not liable to arrest on mense or final process, 19 Must attend on subpoena duces tecum, 19 Cannot practise as counsel, attorney or solicitor, 19 Entitled to fees as arbitrator though named as Judge, 19 Effect of death on cases pending, 19 Senior Judge to hold court when expedient, 1, 7, 19 To determine procedure when several courts are held at same time,

Illness or absence of, who to preside, 19
Of another county may act for, 19
May appoint deputy (see Deputy Judge), 19, 20, 21
Lieutenant-Governor to be notified, 20
May perform judicial duties in other counties, 20
Cannot preside at General Sessions of other counties, 20
Duration of appointment of deputy, 20, 21
Lieutenant-Governor may annul, 21
Meaning of, includes Junior Judge, 20
In absence of, clerk may adjourn court, 21

ignee, 80, 82

orn, etc., 53

ellable, 141 be ordered

arties), 142

JUDGE-Continued.

May suspend or remove clerk or bailiff appointed by Judge, 23
Responsibility of, as to performance of officers' duty and security,
23, 31

May suspend clerks or bailiffs, 23

To report suspension to Provincial Secretary, 23

To notify Provincial Secretary of vacancies, 23

May remove deputy clerk or deputy bailiff, 26

To fix amount of security to be given by officers, 26

To approve such security, 26

Approval to be in writing, 31

Responsibility as to security judicial only, 31

To notify officers of death, withdrawal or insolvency of surety, 33

To be notified by surety intending to withdraw, 33

To approve new bond in such cases, 34

To suspend clerk if new surety not furnished, 34

To report thereon to Provincial Secretary and inspector, 34 See Sureties.

To revise taxation of costs (see Costs), 38

To have access to accounts of fines and suitor's moneys, 38

To be furnished with account of suitor's moneys when required,

Jurisdiction of (see Jurisdiction), 53-

Cannot exceed statutory authority, 54

When conditions precedent to its exercise absent, is coram non judice, 54

Liability of, to prohibition (see Prohibition), 55

Liability of, to mandamus (see Mandamus), 64

Cannot assume functions of jury, 58

Nor grant new trial after fourteen days except in garnishee proceedings, 59, 212

Decision of, on question of jurisdiction, 61

Powers of, within jurisdiction, 61

When no jurisdiction, liable to prohibition, 61

Where decision on mixed question of law and fact reversed, 61

Decision of, as to question of title to land (see Action for Recovery of Land), 68, 69

May make orders agreeable to equity and good conscience, 73, 78

Power of, under this provision, 78

To hear and determine questions of law or fact in a summary way,

May order payment in money though contract for payment in kind, 79

When Superior Court refused to disturb finding, 85

May sue or be sued in adjoining county, 125

May order substitutional service, 133

JUDGE-Continued.

May order parties to be added as defendant, primary debtor or garnishee, 142

May order statement to be furnished of names of partners, 143

May set aside judgment by default, 146

May order speedy judgment, 153

On motion for speedy judgment may order defendant's examination, 153

May suspend execution and order payment into court or otherwise, 154

May enter judgment against one defendant and allow co-defendant to defend, 154

May give leave to defend conditionally, 154

May give leave to dispute claim at any time before judgment, 161

To try cause and to give judgment (see Trial), 162, 163

Cannot try cause in plaintiff's absence, 164

Proper course in such case, 164

May give judgment in default of appearance by defendant in court, 166

May adjourn hearing of cause, 167

May issue order for commission, 195

May postpone or adjourn trial, 169

May exclude persons from acting as agent in certain cases, 170

May give decision instanter or postpone judgment, 208

Cannot alter decision at will, 208

May alter it before entry, 208

May order times and proportions in which judgment to be paid, 211

May order same to be paid into court, 211

To take evidence in writing in appealable cases, 164, 165

May grant new trial, 211

May, on application for new trial, give judgment, 214

May postpone execution in certain cases, 215

Appeal from judgment of (see Appeal), 216, 219

May grant stay of proceedings on appeal, 222

May fix security to be given in such cases, 222

May fine clerk of municipality for breach of duty, 289

May call tales when jury panel exhausted, 240

new carriers when jury puner canadated, 220

May order jury to try any disputed facts, 240

To dispose of case himself unless jury summoned, 240

May discharge jury not agreeing, 241

Power of, as to adjournment, amendment, etc., in garnishee proceedings (see Garnishment), 282

May refer to arbitration, with consent of parties, 283

May set aside award, 287

Authority of, as to costs, 289

Power of, over costs where court has no jurisdiction, 289

of surety, 33

Judge, 23

and security.

tor, 34

ys, 38

nen required,

am non judice,

arnishee pro-

versed, 61 for Recovery

ience, 73, 78

ımmary wa**y,**

payment in

JUDGE-Continued.

Power of, over costs not otherwise provided for, 290
Power of, over process of his own court inherent, 352
May set aside attachment improperly issued, 352
Power of, to award damages in interpleader, 357
May fine for contempt of court, 369
May adjudicate on complaints against officers, 378, 375

JUDGE'S LIST AND JURY LIST-

Causes to be set down on separate lists, 239 Jury list to be tried first, 240

JUDGE'S NOTES OF EVIDENCE. (See Appeal), 164, 165

JUDGMENT-

Effect of, 3-5

To have same force and effect as of Courts of Record, 3 What proved by, 3
Bars action for same cause in other courts, 3
Against agent, bars action against principal, 4
Plaintiff not allowed to vacate in such cases, 4, 140
General rule and exceptions in such cases, 4
Admissions implied by, 4
Estops defendant from denying indebtedness, 4

from denying its correctness or the execution founded thereon, 292

Obtained by covin no bar, and does not effect third parties, 293 What it is necessary to shew in order to conclude plaintiff by estoppel, 293

Would be aided against equitable estate of debtor, 298 Invalid if obtained by untrue statement, 4 Bears interest, 4, 55, 211, 297 May be enforced by action, 4, 147 Of higher court enforceable in D. C., 4, 55, 147, 148 Costs in such cases, 4

When barred by statute of limitations (see Statutes of Limitations), 4

Effect of revivor, 4

When execution issued within 6 years revival not necessary, 5
When application to revive to be made, 5
Action on foreign judgment, 5, 148
Effect of personal service in such action, 132
Of D. C. not enforceable in Superior Courts, 5, 291
May be recalled and a term imposed before entry, 5
When decision of judge becomes a, 18
Entered on holiday may be questioned, 21
Clerk to keep record of, 37

JUDGMENT-Continued.

To be registered by clerk, 38

Erroneous: Judge not liable for, 17, 18, 54

No bar to action where court without jurisdiction, 56

Unwise or unjust not subject of prohibition, 60

May order payment in money though contract for payment otherwise, 79

In replevin, may be divisible, 80

Form of, in action for balance of unsettled account, 106

Against clerks and bailiffs, how enforced, 124

Against one of the several partners or joint-debtors, 140

bars action against others, 3, 140

cannot be set aside, 140

assignment of, when compellable, 141

Against firm (see Partners), 142-145

Motion for (see Speedy Judgment), 153

Against married women (see Married Women), 157, 401

Leave to defend may be given at any time before, 161

By default (see Judgment by Default), 145-152

May be entered by consent on withdrawal of defence, 162

At trial to be given by Judge, 162

When pronounced, 164

When subject of appeal (see Appeal), 165, 216

When defendant does not appear, 166

to be final and absolute, 166, 167

only to be entered on personal service, 167

May be given instanter or postponed, 208

procedure when postponed, 208

when new trial may be granted in such cases, 212

Cannot be altered at will, 208

But may be before entry, 208

Judge may order times and proportions of payment, 211

May be ordered to be paid in instalments, 211, 293, 327

But not so as to postpone execution more than 50 days, 215, 293

May be ordered to be paid into court, 211

Execution on, not to issue within 15 days unless otherwise ordered, 211, 292

May be set aside for irregularity, 212

A stranger cannot apply, unless on the ground of fraud and collusion, 212

May be given on application for new trial in cases heard by Judge, 214, 215

But not after trial by jury, 215

Delay of in order to facilitate appeal, effect of, 220

Not to be post-dated so as to extend time for appeal, 220

When obtained by fraud appeal not the remedy, 220

d, 3

375

ution founded

parties, 293 le plaintiff by

93

es of Limita-

cessary, 5

JUDGMENT-Continued.

When to be given in appealable cases, 220

In appeal (see Appeal), 230

Where deemed to be recovered, 264

In garnishee proceedings after judgment (see Garnishment), 266,

In garnishee proceedings before judgment (see Garnishment), 269, 270

Not to be given until summons and memorandum with proof of service filed, 276

Execution to be stayed until debt due, 276

Not to be given without proof of debt, 273

On award of arbitrator (see Arbitration), 285

Costs in action on, not to be allowed without order of judge, 291

Right to bring action on, in other courts, 291

Not to be set aside for matter of form, 292

Not removable to Superior Court, 293

Verbal order of Judge, sitting in court, is a, 293

Revival of, on death of party, 308

Transcript of (see Transcript), 305, 310

In attachment proceedings-

Where excess over \$100 abandoned, 345, 346

When debtor does not appear, 350

how enforced, 350

When summons served personally, 351

Against bailiff ---

In action for negligence (see Bailiff), 375, 376

Cross-judgments-

May be set off, 303

Not to prejudice solicitor's lien, 303

JUDGMENT BY DEFAULT-

If defendant suffers, Judge not liable for absence of jurisdiction, 18 Against firm, effect of (see Partners), 145

In proceedings by special summons-

In default of notice disputing claim, 145

Actions and claims within scope of, 146, 147

Requisites of claim and service, 145, 146, 148

May be entered against one of several defendants served, 146, 148 effect of, 148

When execution may issue on, 148

To be entered by clerk within one month from service, 145, 150 effect of omission to enter in time, 150

Setting aside-

Grounds for, 146, 148-150

Imposition of terms, 149, 150

JUDGMENT IN DEFAULT-Continued.

For irregularity in service (see Service), 131 Order for, must be served forthwith, 150

On failure to appear in court-

Judge may order, 150

To what cases applicable, 150, 151

Proof of claim and service, 150-152

Is discretionary, 152

Costs on, 152

Not applicable to attachment, 152

Consequences and effect of, 152

Leave to defend-

May be given at any time before, 161

JUDGMENT DEBTOR (see Judgment Summons)-

Examination of-

Summons may issue for, 320

May take place at hearing, 334

On judgment entered on transcript to county court, 313

Effect of refusal to attend in such cases, 313

JUDGMENT SUMMONS-

Liability of Judge on order for commitment to wrong gaol, 17

Examination of judgment debtor, 320

Who entitled to issue, 320, 321, 322

May be had on judgment for costs, 321

Execution need not issue prior to, 321

Effect of issuing vexatiously, 321

Liability for proceeding against wrong man, 321

Court out of which summons to issue, 320

Grounds for, 322

Application for, to be in writing, 339

Affidavit for-

Requisites of, 321, 323

Who may make, 321, 323

Is a condition precedent to examination, 323

Effect of order of commitment in absence of, 323

May be waived by appearance of debtor, 323

Defective affidavit, effect of, 323

Against Firm-

Liability of partners to examination, 322

Service of-

Manner of service, 320, 322

Affidavit of, 322, 326

Form of affidavit, 322

Time of service, 326

Procedure when not served, 322

urisdiction, 18

ishment), 266,

ishment), 269,

with proof of

of judge, 291

rved, 146, 148

ce, 145, 150

JUDGMENT SUMMONS - Continued.

Examination-

Time and place of, 323, 324

May be in Judge's chambers, 324

What debtor bound to disclose on, 323

To what period restricted, 323

Other witnesses may be examined, 324

Costs, 324

Procedure necessary for re-examination of party examined and discharged, 324, 325

What deemed a full disclosure, 325

Not applicable to corporations, 322

Nor to married women, 322

As to liability of married women to examination (see Married Women), 322

Non-attendance-

Consequence of refusal or neglect to attend, 325

Requisites of service in such cases, 326

Sufficient reasons for, 326

Cases only in which debtor may be committed, 329

Second summons not now necessary, 330

Requisites of service, 330

Costs may be allowed debtor in certain cases, 329, 330

Refusal to be sworn-

Effect of, 325

Unsatisfactory answers-

Effect of, 325, 326

What deemed to be, 326

False pretences fraud a breach of trust-

Obtaining credit by means of, 325, 326

Meaning of, 326, 327

Fraudulent acts justifying commitment, 327

Making gift delivery or transfer of property-

When ground for committal, 325, 327

Is a criminal offence, 327

Cases within provision, 327

Sufficient means and ability to pay-

Refusal or neglect to pay in such case, effect of, 325, 326

What deemed to be, 327

Order for payment-

May order payment of whole debt or by instalments, 326, 327, 334

If not for instalments, sufficient means, etc., must be found, 327

Cannot be made for alternative causes, 327

Discretionary powers of Judge, 327

Order for committal cannot be embodied in, 328

Judge may rescind, alter or amend at any time, 333

JUDGMENT SUMMONS-Continued.

Order for Committal-

Requisites of, 328, 329, 330

Judge's endorsement on summons held to be, 380

Subsequent order illegal, 330

Minute taken by clerk would not be, 880

Is not process for contempt, but limited execution, 333

Cases in which order may and may not be made, 328

Not bad for stating offence in alternative, 328

But would be if made in alternative of payment or imprisonment, 328

May be made as often as offence committed, 328, 329, 334, 335

If postponed debtor must be again heard, 328

May be made in presence of debtor without further summons, 328

Not applicable to resident out of jurisdiction, 328

Cannot be embodied in order to pay, 328

Second order may be made when first not acted on, 328

Jurisdiction of High Court to review order, 329

Warrant of Commitment-

To be issued by clerk, 330

Requisites of, 330, 331

When issuable, 330

Liability of Clerk in respect of, 330

Habeas Corpus Act applicable to imprisonment under, 330

Execution of Warrant-

Who may execute, 330, 331

Duties of officer in respect of, 331, 332

Liability of officer in respect of, 331, 332

Improper for bailiff to discharge debtor, 332

Constables and peace officers to aid in, 332

Refusal to aid a misdemeanour, 332

Liability of goaler in respect of, 333

Gaoler cannot receive debt and discharge prisoner, 333

How term of imprisonment computed, 333

Life of warrant, 328, 330

Effect of plaintiff compounding debt with debtor, 328

Discharge from Custody-

How obtained, 333

Examination of Debtor at Trial-

When defendant personally served Judge may examine, 334

Order may be made as in case of judgment summons, 334

1mprisonment-

Debt not to be extinguished by, 334

Fresh execution not to issue during, 835

Return by Clerk-

To be made annually of number of persons committed, 335

D. C.A. - 31

326

326, 327, 334 found, 327

amined and

(see Married

JUNIOR COUNTY-

Divisions to continue on separation from senior county until altered, 12

Disposal of papers, etc., in such cases, 14

Proceedings to continue in senior county in certain cases, 14

JUNIOR JUDGE-

May preside at courts, 17

To hold Division Courts subject to arrangement with senior Judge, 17

Appointment of, not to excuse senior Judge from presiding when expedient, 17

The word "Judge" includes, 20

May appoint deputy (see Judge), 20

Actions by or against may be brought in adjoining county, 125

JURAT-

Requisites of (see Affidavit), 119
Omissions or alterations in, effect of, 119

JURISDICTION-

Questions of, affecting appointment of place of sitting, 6 Liability of Judge where none apparent (see Judge), 19, 54 If judgment by default, Judge not liable for want of, 18 Duty of clerk, where absence of clear, 36 Resident of foreign country not subject to, 36, 134 Except where he has an office and an agent in Ontario, 134-137 Of Division Courts, limited, 53 Every circumstance to give, must appear, 54 Remedy where none exists (see Prohibition), 54 Remedy when Judge refuses to adjudicate (see Mandamus), 54 When claim for wages not maintainable, 54 Liability of Judge in such cases, 54 Effect of agreement to refer disputes to arbitration, 54 Not ousted by action for same cause pending in High Court, 55 Not admitted by defendant appearing to object to, 55 In actions of detinue, 55 When none, Judge can neither amend nor adjourn, 55 In action of trover for a deed, 55 In actions on judgment of High Court (see Addends), 55 Cases in which prohibition may be applied for (see Prohibition), 55-65

When defect apparent, 56
When defect not apparent, 56
Acquiescence in, 58
When exception must be taken to, 58
Denial or perversion of right, 58

inty until

s, 14

th senior

ding when

ıty, 125

54

134-137

us), 54

ourt, 55

ibition), 55-

JURISDICTION-Continued.

Amendment to give, 59

When Judge interested, 59

When dependent on contested facts, 60

Cases in which Division Courts not to have-

gambling debts, 65

spirituous liquors, 66

illegal promissory notes 68

actions in which title to and in question, 68

questions relating to Toll, Custom or Franchise, 71

validity of devise, etc., disputed, 71

malicious prosecution, libel, slander, criminal conversation,

seduction, breach of promise of marriage, 71, 72

Actions against justices of the peace, 78

See Particular Titles

No assent can cure total want of, 56, 125

Effect of absence of notice made a condition precedent to, 59, 256,

Distinction between excess and improper exercise of, 59

Where discretionary prohibition will not be granted, 59

Onus of proving on application for prohibition, 62

Ousted by question of title to leasehold, 71

In replevin (see Replevin), 79

Actions to which Jurisdiction Extended-

In replevin (see Replevin), 79-86

Action on replevin bond, 87

In actions for penalties and forfeitures, etc., 88

In respect of counter-claim, 98

In actions for balance of unsettled account (see Unsettled Account),

102, 105, 106

Abandoning excess to give, 105

Courts having, to have full power, 109

Personal actions, 73, 75

Definition of, 75

What causes of action are personal, 75

Pebt or contract, where amount or balance claimed does not exceed

\$100: 73, 75, 102

Where account in the whole not exceeding \$400: 75, 102

Effect of reduction by credits, 75

by set-off, 75

Claims deemed within jurisdiction, 75

Where amount ascertained by signature of defendant-

In any claim not exceeding \$200, signature of party will give, 75

What is sufficient acknowledgment, 75

Table of cases, shewing decision of courts thereon, 76

Amount must be ascertained before action, 77

JURISDICTION-Continued.

Costs, if suit brought in High Court, 77

No more than \$200 recoverable, 77

If interest added it must be abandoned, 77

excess may be abandoned at trial, 78

What signature sufficient, 77

if by agent, 78

Assignee of debt may maintain action, 78

Absconding Debtors, 74

Claims against must not exceed \$100, unless accertained by signature, 74, 78

For what amount attachments may issue, 74

Combining Causes of Actions, 74, 78

In what actions and for what amounts claims may be combined, 74.78

Parties, 78

Finding of court to be separate, 75

Divisions in which actions may be entered and tried (see Territorial Jurisdiction), 109-120

Against clerks or bailiffs, 123, 124

Against Judges or stipendiary magistrates, 125

Against foreign corporations, firms, or individuals, 136, 137

On application for new trial (see New Trial), 212

In garnishment proceedings (see Garnishment), 256, 257 notice disputing, when necessary, 256, 257

JURORS-

Who may be, 234, 235

Provisions of Jurors' Act respecting, 235

Voters' lists to shew persons qualified as, 235

How selected, 235

Effect of improper selection, 234, 236

Irregularity may be waived, 234

Clerk of municipality to furnish D. C. clerk with copy of lists, 236

Proceedings against clerk of municipality for refusal to furnish, 238 penalty therefor, 239

How summoned, 237

Service of, to be verified by oath of bailiff, 237

Right of challenge, 237, 238

Penalty for disobeying summons, 238

Service as in D. C. not to be exempt from serving in Courts of Record, 238

Fces of-

Provisions not applicable to Judge's jury, 243

Conditions entitling to, 243, 244

Persons sworn under a tales entitled to, 244

How and by whom paid, 243

JUBY-

Judge cannot assume functions of, 58

Unless legally demanded, Judge to try question of law and fact, 78

Right to extended to replevin, 85

Adjournment of trial in cases tried by, 169

Judgment cannot be given on application for new trial in such

Non-suit may be directed at trial when there is no evidence to submit to, 215, 240

New Trial-

May be granted, 213, 215

Grounds of, 213

Right to-

/ signa-

nbined,

l Juris-

ists, 236

ish, 238

curts of

Cases in which jury may be required, 232

Condition on which right depends, 232

If conditions complied with, party cannot be deprived of right, 282

Effect of withdrawal of juror, 212, 233

Notice of-

When and how to be given, 233, 234

Judge cannot extend time for giving, 233

Is a condition of right to, 234

Must be in writing, 234

In Interpleader-

Right to, 233

Summoning-

Payment of fees by party applying, a condition of right to, 284

Summoning and selecting jury (see Jurors), 235, 237

Not less than 12 persons to be summoned, 237

Challenging, parties entitled to, 237

grounds for, 237, 238

Trial By-

Causes to be set down on separate lists, 239

Jury list to be disposed of first, 240

Five jurors to be empannelled, etc., 240

Oath of, 240

Verdict to be unanimous, 240

When panel exhausted Judge may order a tales, 240

Judge's Jury-

May be ordered to try disputed facts, 240

Procedure thereon, 240, 241

Effect of, 241

Discharging Jury-

On failure to agree, 241

Cause may be adjourned to next court, 241

Proceedings thereon, 241

JURY-Continued.

Jury Fund-

How and by whom payable (see Jury Fund), 242 Fees of Jurors (see Jurors), 243, 244

JURY FUND-

How and by whom payable, 242
Return thereof to be made annually to county treasurer, 242
Returns in cities forming separate divisions, 243

JUSTICES OF THE PEACE-

Action against, not maintainable if objected to, 54, 72
Adjudication by, on claim for wages bars action in D. C., 54
Notice of objection, requisites of, 72
effect of, 72, 107
Costs, where action brought in higher courts, 72
May take affidavit and issue warrant of attachment (see Absconding Debtor), 342
Proceedings in such cases, 342, 343

Proceedings in such cases, 342, 343 Liability of, for attachment improperly issued, 342, 343 No fees allowed to for issuing attachment, 342 How fines enforced by, 377, 378

L.

Land (see Action for Recovery of Land)

Action in which right to, in question not maintainable in D. C., 54, 68

Action for overflowing may be brought in D. C., 70

LANDLORD-(see Interpleader)

Meaning of, 355

Meaning of "agent," 355

Meanings of "joint-tenancy," "co-parcenary" and "tenants-incommon," 355

Claims of, in respect of goods seized, 355

Who entitled to "immediate reversion," 355

Claims of, how to be adjusted, 356

When actions in High Court may be stayed, 356 Costs, 356

County Judge to adjudicate on claims, 356

Claims by, for Rent-

Provisions in respect of rents due to, 365 Statute of Anne not applicable to D. C., 365

Meaning of "landlord of a tenement," 365

Notice to be given to bailiff, 365

LANDLORD-Continued.

What notice should contain, 365
Cases in which notice may and may not be given, 365, 366
When claim to be made, 367
What rent may be claimed, 366
How bailiff is to proceed, 366-368
Goods liable to distress, 367
Bailiff may be sued by, for money made, as money had and received, 367

Fees of bailiff in such cases, 368

Table of, 368
Proceedings if replevin made of goods distrained, 368, 369
When claim of, is to be first paid, 369
See Landlord and Tenant.

LANDLORD AND TENANT-

Where jurisdiction ousted in actions between (see Actions for Recovery of Land), 69 Replevin of goods distrained (see Replevin), 31, 83 Justification of distress by landlord in such case, 85 Liability of landlord for acts of his bailiff, 88

LEASE-

When jurisdiction ousted in action on (see Actions for Recovery of Tand), 69

LEGAL CLAIMS -

Giving effect to, provisions of Judicature Act respecting 'see Relief', 89

LEGISLATURE-

Powers of, as to appointment of inspector, 24 to make laws for enforcing provisions of statutes, 41 to delegate authority to board of county judges, 391

LIBEL-

Action for, not maintainable in D. C., 54 Refusal of copy of, prohibition therefor, 58 Definition of, 72

LIEN-

Of bailiff for fees when action settled, etc. (see Fees), 46, Of solicitor for costs (see Solicitor), 252

LIEUTENANT-GOVERNOR-

Approval of, required for establishment of clerks' offices in same division in cities, 6

May regulate holding of courts in certain cases, 9

In Council to approve of courts established, 12

54

bscond-

n D. C.,

ants-in-

LIEUTENANT-GOVERNOR-Continued.

To be notified of appointment of deputy Judge, 20 May annul appointment of, 21 May appoint during pleasure, clerks and bailing May dismiss clerks and bailings, 23 To be informed of all matters by inspector, 50

LIMITATION-

Under will, action for, not maintainable, 54, 71 Of action against officers and their sureties, 30

LIMITATION OF ACTION-

For things done under this Act, 383

LIMITATION, STATUTES OF (see Statutes of Limitations), 180

LIMITS OF DIVISION COURTS-

As existing when Act takes effect, to continue, 2 Alterations in, 10
On separation of junior from senior county, 12
Regulation of, on separation of a county, 14
See Division Courts

LIQUIDATED DAMAGES-

Agreements by way of, power of court to grant relief against (see Relief), 88, 96

Liquors-

(See Spirituous or Malt Liquors), 66, 67 Action for, when drunk in tayern, etc., not maintainable, 53

LIST OF CASES FOR TRIAL-

Suits transferred, to be placed on, 121, 122 Order in which actions to be placed on, 164

in jury cases, 233, 234

LOST NOTE-

Security to be tendered before action on, 128

LUNATIC-

Service of process on (see Service), 135 Guardian ad litem to be appointed for, 135

M.

MAINTENANCE OF COURT HOUSE (see Court House), 9

MAINTENANCE AND SUPPORT— What included in, 255

MALICIOUS PROSECUTION-

Action for, not maintainable in D. C., 54

MALICIOUS PROSECUTION-Continued.

Cannot amend by changing to false imprisonment, 59

In action for false imprisonment, Judge may consider matters the subject of, 60, 71

Foundation for action of, what is, 71

Where particulars shew false imprisonment, action maintainable, 71

What deemed action for, 71

Cases held not to be, 71

MALT LIQUORS (see Spirituous or Malt Liquors), 66

MANDAMUS-

Judge's discretion, when exercise of may be compelled by, 5

Definition of, 64

Where other remedies exist, will not be granted, 64

When application for, to be made, 64

Judge, having decided that he has no jurisdiction, will not be compelled to re-hear case, 64

Cases in which it was held otherwise, 64

Jurisdiction must clearly appear, 64

Will not issue to compel alteration of adjudication in matters within jurisdiction, 64

Nor to compel clerk to act in disregard of adjudication, 64

Nor to compel Judge to approve security on appeal, 64

Nor to certify proceedings after proper time, 64 .

Nor to revoke decision on point of practice, 64

Nor to exercise discretion in a particular way, 64

Will compel Judge to try cause before him unless interested, 64

Was granted on refusal to adjudicate in interpleader proceedings on ground of insufficient claim, 64

And to compel clerk to issue execution, 64

On refusal of clerk to transmit papers on order of changing place of trial, 120

To compel clerk to certify proceedings on an appeal, 224

And to compel Judge to approve bond, 224

Application for, 64

how and where to be made, 64, 65 how proceedings entitled, 65

MARKET OVERT-

Purchaser at, cannot acquire title in Ontario, 83

MARRIED WOMEN-

Have same rights as other joint debtors, 4

When competent as surety, 27

When, in proving separate estate, title may come in question, 69

gainst (see

234

MARRIED WOMEN-Continued.

Speedy judgment may be ordered against estate of, 157 proof necessary in such cases, 157

Not liable to commitment on judgment summons, 322

Nor to be examined, 322

Nor to order for payment out of income subject to restraint on anticipation, 322

Liability to such proceedings in Superior Courts, 322

Creditors' rights determined by statute at time debt contracted, 322

Power of judge to order examination for purpose of discovering separate estate, 322, 394

Judgment against, personal not proprietary, 394

Claims by and against-

Right to sue and be sued, 394, 395

Necessary to allege separate estate, 305

Practice in Division Courts, 395

Onus of proving separate estate, 395

Not necessary if debt contracted before marriage, 395

Effect of omission to prove, 395

Presumption that separate estate bound --

Contracts deemed to be in respect of separate estate, 395

Liability on joint contracts, 395

Not liable to equity as to payment of mortgages on lands purchased, 396

Nor for moneys received believing she was entitled thereto, 396

Liabliity for debts of her testator on alieniation by her of property, 396

Not liable for solicitor's costs without express contract, 396 Liability of husband for such costs, 396

Exceptions-

Cases where presumption cannot arise, 396

Proof necessary when estate subject to restraint on anticipation is paid over to her, 396.

What is separate estate-

Definition of, 397

Land, 397

Personal property, 398

Personal earnings, 398

Husband trustee for, when no other appointed, 398

What is not separate estate-

Real and personal property not liable for debts, 398, 399

Restraint on anticipation-

What is, 399

To what property applicable, 399

MARRIED WOMEN-Continued.

Death of husband, effect of on, 399

During widowhood property not liable for debts contracted during coverture, 399

How restraint imposed, 399

Court may give power to charge estate restrained, 399

In what cases power to charge estate given, 399

Death of husband-

Effect of, 322, 400

Death of wife-

Rights of representatives, 400

Liability of husband, 400

Administration of estate by court, 400

Statute of limitations -

When actions barred by, 400

Provisions of Trustee Act, 400

Dispute between husband and wife-

Remedies for security and protection of property, 400

Rights and liabilities of parties, 400

Husband dealing with estate as his own, effect of, 400, 401

Judgment against-

How recoverable, 401

Form of, 401

Personal, but execution limited to separate estate, 401

Not liable to imprisonment on, 401

What separate estate bound by, 401

For costs only, what bound by, 401

Property subject to restraint liable for debts before marriage, 401

Execution against-

What limited to, 401

Effect of, where property held by trustees, 401

Inquiry to ascertain separate estate and appoint receiver of it, 402

Who may be appointed receiver, 402

When defendant may be ordered to pay by instalments, 402

Trustees may be ordered to produce estate, 402

Injunction-

Cannot be restrained by, before judgment, from disposing of estate, 402

Security for costs-

When order for, may be made, 402

MASTER AND SERVANT-

Goods repleviable by employer from workman (see Replevin), 82

When servant cannot bring replevin, 83

When injunctions may and may not be granted as to contracts for personal services, 92

7

restraint on

t contracted.

discovering

395

nereto, 396

n lands pur-

r of property,

ct, 396

anticipation

399

A.

MASTER AND SERVANT-Continued.

Infant not liable to action for breach of apprenticeship deed, 93

Minors may sue for wages in D. C. up to \$100: 99

Right of servant to recover wages (see Wages), 100

Various terms of hiring, 100, 101, 102

Contract to be performed within one year, 102

Right of master to dismiss, 100-102

Various causes giving right to dismissal, 100, 101, 102

Dissolution of contract, 100, 101

By death, 101

Parting with business, 101

Premises destroyed by fire, 101

Incapacity of servant from illness, etc., 101

Damages for wrongful dismissal, 100, 101, 102

Contracts between parent and child or persons occupying parental position, 102

Contracts between brother and sister, 102

Services rendered in expectation of marriage, 102

MATTER OF FORM-

Proceedings not to be set aside for, 292

MAY-

And other words conferring powers, construction of (see Words), 5, 15

MECHANICS' LIEN-

Accepted order equivalent to payment as against persons claiming under, 128

When lien of sub-contractor takes effect, 279

Rights of sub-contractor as against attaching creditors, 279, 280

MERITS-

Affidavit of, 148

MEMORANDUM-

On garnishee summons for claim of wages, etc., 257

Form of, 258

On attaching order after judgment, 263

On garnishee summons before judgment, 267

Of appraisement to be endorsed by bailiff on inventory in attachment, 344

MILEAGE-

Not to be allowed to bailiff out of county, 41

How computed, 140

Bailiff not entitled to on return of nulla bona, 305

hip deed, 93

pying parental

(see Words), 5,

rsons claiming

tors, 279, 280

tory in attach-

MINOR-(see Infant)

May sue in D. C. for wages not exceeding \$100: 99

MISCONDUCT-

What is, 29, 273

Damage is essence of, in action for, 29

Of clerks and bailiffs (see Clerk and Bailiff), 373

Extension 273, 374

Extortion 373, 374
Penalty for, 378, 374
Must be intentional, 373
Negligence of bailiffs (see Bailiff), 374

If wilful, a criminal offence, 374

MONEY DEMAND-

Definition of, 146 Cases within the meaning of, 146, 147 Claims of, not exceeding \$100 may be sued in D. C., 73 And if amount ascertained up to \$200: 73

MONEY AND BANK NOTES-

When liable to seizure under execution (see Execution), 314

MONEY PAID-

Under compulsion of legal process not recoverable, 4

MISINTERPRETATION OF LAW-

Subject for appeal, not prohibition, 60

MONEYS COLLECTED-

Punishment of persons wrongfully withholding, 40 Account of, to be kept by clerk, 38

to be furnished to Judge, 39

List of, to be made out by clerk annually and put up in court room and office, 39

By bailiff on process issued out of his division, 139

On receipt of, clerk to mail notice, 387

See Suitor's Moneys

MONEY HAD AND RECEIVED-

Claim by mortgagor against mortgagee for surplus after sale may be recovered as, 75

MORTGAGE-

Claim by mortgagor against mortgagee for surplus after sale suable in D. C. when total realized less than \$400: 75

Interest of mortgagor in goods liable to seizure under execution, 314

Rights of purchaser in such cases, 314

Registered under Land Titles Act, procedure on seizure of under execution, 315

MUNICIPALITY -

To furnish accommodation for holding courts, 7

May be compelled by mandamus to furnish such accommodation

Establishment of courts on petition of, 11

Clerk of-

Duties and liability as to jurors (see Clerk of Municipality), 236,

MOTION-

For prohibition (see Prohibition), 57, 62

For mandamus (see Mandamus), 64, 65

For speedy judgment (see Speedy Judgment), 153

MUTUAL INSURANCE APPEALS (see Appeal), 217

N.

NEAREST-

Meaning of, 114

To the residence of defendant, 114, 124

Justice of the Peace, 44

NEGLIGENCE-

Of bailiff (see Bailiff), 374

Action against bailiff and sureties for, 375

Judgment and execution in such cases, 376

NEXT FRIEND-

Requisite in action by infant for anything but wages (see Infant), 99, 100

NEW TRIAL-

As to altering judgment on application for (see Judgment), 5

When granted on terms which are not complied with, prohibition refused, 57

Clerk, on application, to forward notes of evidence to judge, 165

Application for—

May be granted within 14 days, 212

How time computed, 212

Time cannot be extended, 212

Exceptions, garnishee proceedings and on postponement of judgment, 212

If granted after expiration of time prohibition will lie, 59

Distinction in respect of setting aside irregular judgment, 212

When refused, Judge's authority does not end, 212

NEW TRIAL-Continued.

May be granted on fresh material in such cases, 212

Notice of motion for, may be dispensed with, 212

Does not waive right to object to jurisdiction, 212

Cannot be allowed where non-suit taken on unfavorable charge to to jury, 212

May be granted though juror withdrawn, 212

And where Judge decides he has no jurisdiction, 212

And where plaintiff takes non-suit in deference to Judge's ruling, 212

Grounds for granting-

What are, a question for Judge, 213

Finding of Judge will not be reviewed on prohibition, 213

But may be set aside on appeal, 213

What held to be good grounds for, 213

When objection must be taken as to improper admission or rejection of evidence, 213

Principles of practice in High Court applicable, 213

Improper non-suiting of plaintiff, 213

Perverse verdict or verdict against weight of evidence, 213

Surprise and discovery of new evidence 213, 214

When judgment wrong in law or fact, 213

Not for production of corroborative evidence only, 214

In jury cases-

Where non-suit set aside defendant entitled to, 213

Not where verdict reasonably consistent with evidence, 213

Where finding inconsistent with answers to questions submitted, 214

Costs in such cases, 214

When damages excessive may be reduced, 214

When jury have not considered all elements of damage, 214

Judgment on application-

When tried by Judge, may be entered for either party, 213, 214

Affidavits for, by whom made, 214

Requisites of, 214

Costs, usual practice as to, in such cases, 214

Appeal, lies from either granting or refusal, 217

Order need not be formally drawn up, 220

Nonsuit (see Trial)

Cannot be entered where title in question, 70

Effect of, 91, 164

Plaintiff may insist on, 163, 164

May be entered against plaintiff's will, 164

After plea of tender (see Tender), 175

When granted without plaintiff's consent on opening speech of counsel will be set aside, 213

s (see Infant),

mmodation

ipality), 236,

nent), 5 ı, prohibition judge, 165

ment of judg-

e, 59

ment, 212

NOTARY PUBLIC-

Judge cannot act as, 19
Affidavit may be administered by, 207

NOTE OF HAND-

Meaning of (see Illegal Promissory Notes), 68 Given for gambling debt or intoxicating liquors not suable in the D. C., 54, 68

NOTICE-

Right of person to in proceedings affecting their interests, 120, 265 Of appointment of deputy Judge, to be sent to Lieutenant-Governor,

Absence of, when made a condition, ousts jurisdiction, 59, 178
When insufficient, cannot be amended, 59
On application to change place of trial, 119
To be given by clerk on transfer of suit brought in wrong court,

121, 122
Given by clerk on transfer of suit brought in wrong court,
121, 122

Of tender and payment into Court, 175
Of payment into court in satisfaction of claim, 178

Of intention to proceed after tender or payment into Court, 178

Notice of set-off by defendant, 179 by clerk, 180

Requiring jury (see Jury), 233, 234

Of return of nulla bona to execution on transcript of judgment, 307

NOTICE OF ACTION-

Judge entitled to, 18, 383

Not necessary in replevin, 80

To be given to parties acting in pursuance of Act, 383

Persons to whom protection of statute extends, 383

Circumstances under which parties acting may claim the right to, 383

When necessary, 383, 384

Cannot be avoided by plaintiff suing in assumpsit, 383

When want of, must be raised, 384

Application of provision to requirements of statute as to notice of statutory defence, 384

Requisite of notice, 384, 385

Effect of reference to statute not applicable, 385

Instances where notices and service held sufficient, 385

Service, time and manner of, 385

NOTICE OF ALTERATIONS IN DIVISIONS-

Giving and proclamation of, in General Sessions, 10, 11 Duty of clerk of the peace as to, 11 Public notice of, to be given, 11 Notice of Alteration in Division Courts—Continued. Effect of absence of, 11 No alteration to be made without, 15

NOTICE DISPUTING CLAIM-(see Defence)

Effect of, waives irregularities in service, 132
When to be entered, 146, 148
Judgment by default on failure to give, 145
Notice of statutory defence, set-off, etc., sufficient, 158
May be allowed at any time before judgment, 161
May be withdrawn, 162
procedure thereon, 162

Payment into Court operates as, 178

Must be given on defence of no signed bill in action for costs, 187

NOTICE DISPUTING JURISDICTION-

Where wages or salary sought to be garnished (see Garnishment), 256, 257

NOTICE OF MOTION-

Requisites of--

For order enforcing payment of fees, 46 For prohibition, 62 For mandamus, 64 For speedy judgment, 153-158

NOTICE OF SALE-

Of goods under execution, requisites of, 317, 318
Of sale of perishable property under attachment (see Absconding Debtor), 352, 353

NOTES OF EVIDENCE-

To be taken in writing in appealable cases, 164, 165 Absence of, does not deprive party of right of appeal, 220, 228. When in existence must be certified to Court of Appeal, 221

NOT GUILTY BY STATUTE-

Plea of, in actions against officers of court (see Officers of Court),

General effect of, 381, 386

May be pleaded with plea of tender of amends or payment into court, 386

Non-Performance of Duties-

When officers and sureties liable for (see Sureties), 28

NON-JOINDER OF PARTIES-

Can be set up in action against one of several joint debtors, 140 exceptions, 140

D.C.A. - 32

ble in the

s, 120, 265 Governor,

ong court,

9, 178

ses, 162

ırt, **17**8

gment, 307

e right to,

o notice of

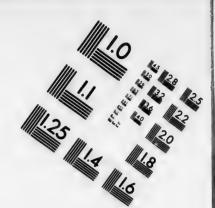


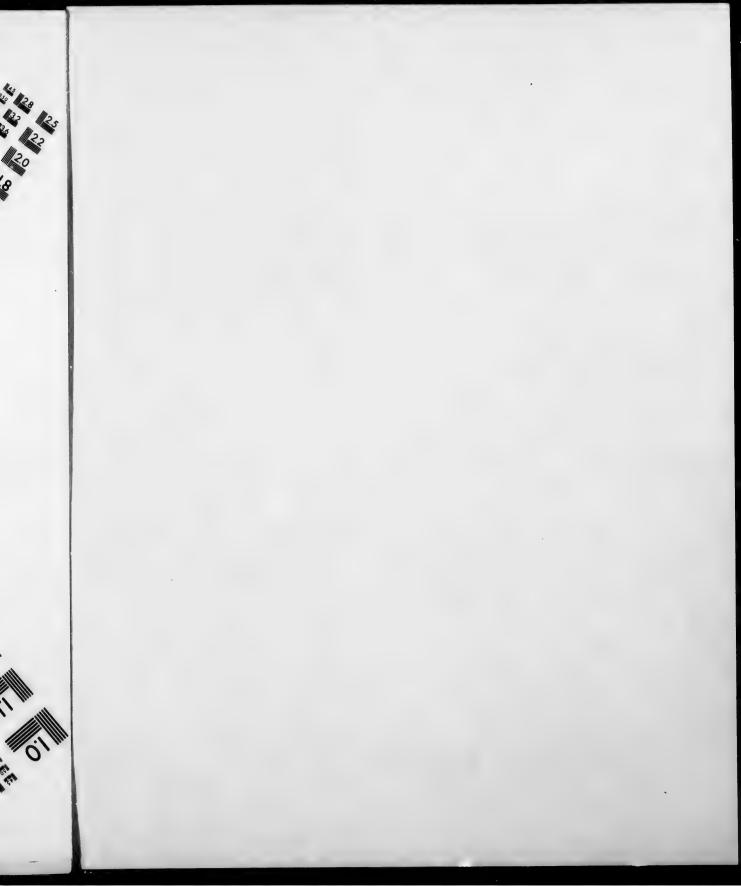
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NULLA BONA-

Return of, what is, 310 Notice of to be given by clerk, 307

NUMBERING DIVISIONS OF COURT-

In counties, cities and towns, 2 Alteration in, 10

NUMBERING PROCESS-

Particulars of claim to be numbered, 127 Summons to bear number of claim, 127

0.

OATH-

Of office, omission to take, not to invalidate action of tribunal, 13

Verifying returns by officers, who to be taken by, 53

Commissioner to take evidence on commission authorized to administer, 203

Of witnesses, (see Witnesses), 193

Affirmation may be allowed instead of, 193

Power of arbitrator to administer, (see Arbitration), 287

On examination of judgment debtor, power of Judge to administer, 324

OFFENCES AND PENALTIES-

Contempt of court (see Contempt), 369-372
Resisting officers—assaulting bailiffs, 372
Misconduct of clerks or bailiffs, 373
Extortion, 373, 374
Negligence of bailiffs, 374
How penalties enforced, 377, 378
Form of conviction for, 378

OFFICERS OF COURT-

No business to be transacted until appointment of, 12

Regularity of appointment presumed, 13

To deliver up papers on separation of counties or transfer of proceedings, 14

To give security, 26

Nature of security to be given and liability of sureties thereon, (see Sureties), 26-36

Inspector to see that duties of properly performed, 50

Inspector may inquire into conduct of, 50

OFFICERS OF COURT-Continued.

To produce books, etc., for inspection, 51

May be compelled to give evidence on enquiry by inspector, 51

To inform inspector of appointment, 52

and of change in surety, 52

To produce to inspector certificate of filing covenant, 52

To keep fee book, 53

To make annual returns to inspector, 53

When possession of goods depends on holding office, the facts must appear to give right to replevy, 81

Protection of-

Actions against, not to be brought until demand of perusal and copy of warrant, 378

Protected even where court has no jurisdiction, 379

What officers and persons are protected, 379

When protection extended to bailiff, 379

When extended to gaoler, 379

Upon whom demand must be served, 379

Requisites of demand, 379, 380

Perusal may be waived, 379

When demand unnecessary, 379

Service of, 378, 380

To what cases protection applicable, 380

Entitled to verdict on production of warrant, 380

Duty of, on being served with demand, 380

Necessity for production and proof of warrant, 380

Necessary when clerk and bailiff joined in one action, 380

Bailiff entitled to verdict when clerk joint defendant, 381

Effect of judgment against the clerk and for the bailiff, 381

Defendant may plead not guilty by statute, 381

Meaning and effect of plea, 381

To what persons right extends, 381

Practice as to, 381, 382

Defects in proceedings-

Levy, etc., not to be unlawful, or person making it a trespasser, 382 Not to be deemed trespassers ab initio for subsequent irregularity,

Persons aggrieved may recover for the special damage, 382

Entitled to notice of action, 382-386

See Notice of Action, 383-385

Limitation of actions-

Where and within what time actions may be brought, 382, 384

Tender of amends-

May tender amends or pay money into court, 386

May plead general issue, 386

Effect of, 386

f tribunal,

horized to

287 administer,

sfer of pro-

ies thereon,

OFFICERS OF COURT-Continued.

Will not cure defect in notice of action, 386

Need not be pleaded when made before action, 386

If not made, defendant may pay money into court with costs, 176,

As to what is sufficient tender (see Tender), 171-178

As to general issue (see Not Guilty by Statute), 381

Costs-

Plaintiff not to have unless verdict over \$10, without certificate, 386

OFFICES-

Of clerks in cities where there are two courts may be in same division, 6

Order of Commitment (see Judgment Summons), 328-330

ORDERS OF COURT-

Clerk to keep record of, 37

To be registered by clerk, 38

For commitment of person wrongfully holding books, etc., not to be conditional, 41

To be served by bailiff, 41

For enforcement of payment of fees (see Fees), 46

May be for payment in money though contract for payment in commodities, 79

Division Courts may commit for disobedience of, 90

Effect of neglecting to take out or serve, 120

If abandoned or waived need not be set aside, 120

For postponement of trial, 167-169

Staying proceedings until further order cannot be abandoned, 175

Not to be set aside for matter of form, 292

ORDER IN WHICH SUITS TO BE TRIED-

Actions transferred, 121, 122

over \$100:164

jury cases, 233, 234

See Trial

OVERFLOWING LAND-

Actions for, may be tried in D. C. though title in question, 70-

P.

PAPERS-

Of office to be delivered up on separation of county or transfer of proceedings, 14

To be held by County Crown Attorney on death or removal of clerk, 40

Punishment of persons wrongfully holding, 40

Forwarded from other divisions provisions as to service, 126

PARENT AND CHILD-

Contracts between for services of child discouraged, 102

PARTICULARS-

Of claim to be made out in detail and delivered to clerk, 127, 145

To be numbered as received, 127

Evidence not to be given except as to matters contained in, 127

No charge to be made by clerk for copies of, 127

Clerk not bound to prepare, 127

Where debt assigned, should be entered in name of assignee, 128

Plaintiff to furnish clerk with, for service, 128

To be annexed to summons, 128

Effect of clerk's neglect to comply with provisions, 129

Service of (see Service), 129

Requisites of, 127, 145, 148, 151

Of set-off (see Set-Off), 179, 180.

PARTIES-

Witness admitting he is real debtor may be made a defendant, 55

To actions of replevin (see Replevin), 83, 84

In actions against one of several joint-debtors (see Pariners), 140

When non-joinder may and may not be set up in Division Courts, 140

Judge may order addition of (see Adding Parties), 142

To garnishee proceedings (see Garnishment), 246

PARTNERS-

One of several may be sued, when resident in different divisions or one or more cannot be found, 140

Procedure in such cases, 140

Partnership debt not joint and several, 140

When one of several sued, non-joinder may be set up, 140

Right of contribution (see Sureties), 30, 140, 141

Meaning of, 141

When enforceable, 141

yment in

tc., not to

osts, 176,

ficate, 386

in same

loned, 175

on, 70

Partners-Continued.

Judgment against one-

Bars action against others, 140

Cannot be set aside to evade rule, 140

When assignable, 141

When partnership property may be sold under, 141

Actions by and against-

May be brought in firm name, 142

Effect of proceedings so brought, 144

Proper manner of describing firm, 144

Service of summons in such cases, 142

Affidavit of, to state name of partner served, 143

Foreign firms, effect of provision on, 143

Agent may be served in Ontario, 145

Where no agent, cannotibe reached. 144, 145

When firm dissolved, firm name may still be used, 144

Execution against firm-

How and against whom enforceable, 143, 145

Judgment against firm-

When sued in firm name judgment must follow, 144

When judgment may be entered, 144

When one partner defends, judgment cannot be entered until after trial, 144

Liability of partners not served, 143, 145

Liability of nominal partners, 145

May be sued on, 145

Undisclosed partners-

Order directing statement of names, 143

Discharged if action not brought in proper firm name, 144

Admission of liability by, 143, 145

May be adjudged partner, 143, 145

May be added at trial, 143

Procedure to bring parties before court, 143, 145

Who may be adjudged partners, 145

Individual carrying on business in firm name, 145

Speedy judgment-

Service on one of several partners sufficiency of, 157

Executions against (see Execution)

Legal effect of, not altered by Creditors' Relief Act, 302

Liability of partners to examination as judgment debtors, 322

How and against whom enforceable, 143, 145

Garnishment proceedings (see Garnishment), 246

Members of firm must be set out in process, 246

All partners should be parties to, 246

Liability where only one of several served, 246

PATENTS-

Questions concerning, cannot be tried in Division Courts, 71

PAYMENT-

Of money under compulsion of legal process not recoverable, 4 Of Fees, to be made in advance (see Fees), 46

Reduction of claim by, so as to confer jurisdiction (see Unsettled Account), 105

Accepted order equivalent to (see Mechanics' Lien), 128

Appropriation of, 185, 186

When not specially appropriated, how applicable, 211

Sufficiency of, to take claim out of Statute of Limitations, 185

Of execution before sale (see Execution), 304

On making, execution debtor to notify clerk, 293, 305

Effect of neglect to give notice, 305

Restoration of goods on, 305

By garnishee, effect of, 262, 263, 272, 274, 275, 277

What is, 277

Under order of court, effect of, in such proceedings (see Garnishment), 275

PAYMENT INTO COURT-

Of bailiff's fees in case of dispute (see Fees), 47

In detinue, 55

Plea of, in action on replevin bond, 87

With plea of tender (see Tender), 171-176

In satisfaction of Claim, 176

Defendant may pay money in, 176

When to be made, 176

Amount requisite, 177

Where several matters included, 177

Effect of, 177, 178

What evidence may be given under, 177

May be pleaded to part of claim, 177

Costs in such cases, 177

Defence of denial not admitted after, 176

Effect of plea cannot be repudiated, 177

Effect of clerk receiving with plea of denial, 177

Operates as notice of defence, 158, 178

Can be pleaded in replevin, 178

No written plea required, 178

Costs, 178

Notice of, clerk to give, 178

Notice of intention to proceed on, to be given by plaintiff, 178

Effect of absence of written notice of, 178

Of judgme it, may be ordered (see Judgment), 211

ntil after

, 322

PAYMENT INTO COURT-Continued.

On garnishee proceedings (see Garnishment), 262, 274 Effect of such payment, 274, 275

As security in appeal (see Appeal), 222-228

PENALTIES-

For neglect by officer to furnish security (see Sureties), 33

For wrongfully holding moneys, books, etc., 40

Authority of legislature to impose, 41

For disobedience to subpæna, 193

For contempt of court, 369-374

Resisting officer, assaulting bailiff, 372

Misconduct of clerks or bailiffs (see Clerks and Bailiffs), 373

For extortion, 373, 374

Negligence of bailiff, 375

How enforced, 377, 378

Form of conviction for, 378

PENALTIES AND FORFEITURES-

Powers of Division Courts to grant relief against (see Relief), 88-96

When courts will hold sum payable a penalty, and when liquidated damages, 93

PERISHABLE PROPERTY, (see Absconding Debtor)

What is, 352

Provisions of Absconding Debtors' Act respecting, 351

Disposal of, under attachment against absconding debtor, 352-354

PERSONAL ACTIONS-

Under \$60 may be brought in Division Courts, 75

Definitions of, 75

What causes subject of, 75

PLEADINGS-

Trial to take place without, 162, 163

POSTAGE AND REGISTRATION-

Of papers transmitted to be costs in cause, 138

POST OFFICE ADDRESS-

Defined, 52

Of sureties to be given to inspector, 52

POSTPONEMENT-

Of judgment, may be made, 208

Effect of, 208, 220

If not in accordance with statute may be prohibited, 208

Of trial-

Judge may order, 167

POSTPONEMENT-Continued.

In jury cases, 169

When new trial may be granted in such cases (sec New Trial), 212 In garnishee proceedings (see Garnishment), 282

Powers-

Discretionary or enabling (sec Discretion), 5, 15, 16.

Of County Judge (see Judge), 17-19

Of Division Courts (see Relief), 88

May grant injunctions and commit for disobedience of orders, 90, 371

May appoint receivers, 90

May order sequestration, 90

Of enforcing orders by attachment, 91

Of High Court, conferred on, 88, 91

In which action brought to have full power before and after judgment, 109

Of Judges (see Judge)

Discretionary, how exercised, 5

Words conferring, how constructed, 5, 15, 16

Inherent, over process of court, 352

Of Legislature -

To delegate authority to inspector (see Inspector), 24

To appoint board of county judges (see Board of County Judges), 394

To impose penalties, 41

POUND KEEPERS-

Replevin not maintainable against, 85

When property is impounded, 85

PRACTICE-

Mere matters of, not subject of prohibition, 60

Principles of, in High Court, applicable to Division Courts in certain cases, 91, 393

Cannot be applied to cases provided for in Act or rules, 393

Powers and procedure of High Court not extended to Division Courts, 393

Rules of High Court held inapplicable, 339, 394

Cases in which principles may be applied, 394

On application for prohibition (see Prohibition), 63

PREFERENCE-

Replevin of goods under bill of sale having effect of, 85 Confession of debt does not have effect of, 288

PREMIUM NOTES (see Insurance)

Provisions as to actions by mutual insurance companies on, 217

73

ef), 88-96 quidated

, 352-354

PRINCIPAL AND AGENT (see Agent), 78

PRINCIPAL AND SURETY (see Surety)

PRIORITY OF EXECUTION (see Execution), 297

From High Court or County Court, 341 None over attachment in Division Courts, 341

Effect of attachment on rights of execution creditors, 342

PRIVILEGE-

No persons exempt from suing or being sued in Division Courts, 99 Of witness from arrest (see Witness), 191

Does not attach to telegrams in hands of telegraph operator (see Evidence), 190

PROCESS-

Meaning of, 3

To be sealed, 2, 3

Disposal of, on separation of county, 14

Not to issue for improper or illegal purpose, 36

Return of, bailiff to forfeit fees for neglect (see Return), 47

How served or executed in absence of bailiff, or at a distance, 138

Inherent power of Judge over (sec Judge), 352

Defect in, not to render levy, etc., unlawful, 382

PROCEDURE BOOK-

To be signed by clerk on each page, 37

Entries in and certified copies thereof to be received in evidence, 37

PROCEEDINGS-

Transfer of, when action entered in wrong court (see Territorial Jurisdiction), 120-122

On submission to arbitration (see Arbitration), 284-286

Not to be set aside for matters of form, 292

Definition of, 38, 45

Mere irregularity in, not subject of prohibition (see Prohibition), 62

Stay of (see Staying Proceedings)

See Process and Procedure

PROCEDURE-

When title to land claimed, 69

In replevin, 76-86

How far principles of, in High Court applicable (see Rules of High Court), 91, 92, 393

Court where action may be tried to have full power before and after judgment, 109

Courts in which suits may be entered and tried (see Territorial Jurisdiction), 109, 114, 115, 116

PROCEDURE-Continued.

Against Foreign Corporations, 116
When action entered in wrong court, 120
In actions against clerks and bailiffs, 123, 124
On transcripts of judgments against clerks and bailiffs, 124
In actions against Judges and Stipendiary Magistrates, 125
On summonses forwarded for service from other divisions, 126
Entry of claim for service, and suit, 127

Service where no bailiff, 138

of process to be executed at a distance, 138

On failure of defendant to appear in court, 166 On plea of tender and payment into court (see Tender), 175

On judgment by default on special summons, 145

PRODUCTION OF DOCUMENTS-

On examination of defendant on motion for judgment (see Speedy Judgment) 154, 160

May be compelled by subpœna duces tecum, 188, 191

When excused, 191

Privileged communications, 190, 192

PROOF (see Evidence)

Of claim when amount under \$15: 166, 167 Claim must be proved in actions for tort or trespass, 167

PROHIBITION-

May be granted, on exercise of jurisdiction not warranted by authority, 55

Only given against court having power to pronounce judgment or order, 55

Cases in which order for may be granted, 55

When want of jurisdiction apparent-

May be granted at any time, 56

When application to be made for, 56

What deemed to be apparent want of jurisdiction, 56

Total want of jurisdiction not cured by assent of parties, 56

Judge in inferior Court having no jurisdiction, no bar to action in other court having jurisdiction, 56

Court bound to issue writ, 56

When appeal prevents, 58

Where defect not apparent-

Writ of right, but not of course, 56

Not granted where defendant appearing does not object, 56

When and in what manner objection should be taken, 56

When suit brought in wrong division, 56, 121

When right waived, 56, 57

Motion for, when made, 57

Delay in making effect of, 57

Courts, 99

erator (see

17 ance, 138

idence, 37

Cerritorial

bition), 62

es of High

before and

Territorial

PROHIBITION-Continued.

What delay held fatal, 57

Default in respect of order for payment of costs, effect of, 57

Other grounds for refusal of, 57, 60

Acts of defendant held not to waive right to, 57, 58

Where title comes in question, will be granted, though not apparent, 69

Granted to home court though transcript issued to another court. 306

Appeal does not necessarily prevent, 58

But should not be allowed if defect not apparent, 58

While appeal pending, will be refused, 58

Will be granted when cause of action divided, 103

Particular issue -

Exception must be taken in court below, 57, 58

Effect of prohibition, 58

upon affirmative decision, absolute, 58 upon negative decision, inferior court proceeds with action, 58

May be granted as to part where breach of contract without jurisdiction, 58

Also to restrain action for recovery of land so far as freehold, but not as to leasehold, 58

Judge may strike out count ousting jurisdiction, 58

Denial or perversion of right-

Refusal of copy of libel or valid plea, 58

Refusal of statutory time for defence, 58

Assumption by Judge of functions of jury, 58

Granting new trial after 14 days, 59

Absence of written notice required by statute, 59, 178

Where court has discretion, must be refused, 59

Amendment to give jurisdiction-

No power to amend where plaint beyond jurisdiction, 59

But excess may be abandoned, 59

If not abandoned, court prohibited as to excess, 59

Where claim of interest causes excess, partial prohibition may be granted unless abandoned, 77

Where Judge interested-

Cause cannot be tried, 59

No objection to disinterested deputy, 59

Where plaintiff Judge's servant, 59

Authorities as to, 59

When prohibition will be refused-

Where facts extrinsic to jurisdiction, 60

When subject of action within, but matter started beyond jurisdiction which court does not try, 60

PROHIBITION—Continued.

Irregularity in proceedings merely, 60

Ur vise or unjust judgment, 60

Mere matters of practice, 60

Doubtful jurisdiction, 60

Judgment against law and good conscience, 60

Improper reception or rejection of evidence, 60

Order against debtor claiming to be discharged insolvent, 60

Excessive levy of goods by bailiff, 60

In action for false imprisonment matters relating to malicious prosecution considered, 60

Erroneously holding debt attachable, 60

or that debt due, 60

Misconstruction of a statute, 60

Refusal of new trial in first instance and afterward granting same, 60

Finding that plaintiff fictitious, 60

Misinterpretation of common or statutory law within jurisdiction, 60-61

Jurisdiction depending on contested facts-

Court may try, if suit prima facie within jurisdiction, 60

Cases within rule, 60

Not granted in such cases until Judge has decided question of jurisdiction, 60

Judge's finding conclusive, 60

Erroneous judgment, no ground for, 61

Unless court has no jurisdiction, 61

Cases in which finding of Judge held not to oust right to, 61

Where finding on question of law and facts reviewed, 61

Finding facts will not give jurisdiction to courts of limited jurisdiction, 61

Erroneous finding on points collateral to merits on which jurisdiction depends reviewable, 61

As wrongly deciding title not in question, 62

On application for, additional evidence shewing jurisdiction may be given, 62

Where title in question-

(See Actions for Recovery of Land), 68-70

Court must be satisfied title really in question, 70

Application for-

When to be made, 56, 57

By whom made, 62

Onus of proving jurisdiction, 62

Material in support of, 62

Notice of motion for-

Service of, 62

Clerk to be served, if application to restrain ministerial act, 62, 63

on may be

of, 57

te, 58

court pro-

ct without

eehold, but

not appa-

o another

yond juris-

PROHIBITION-Continued.

Rules of court-

Practice, 63

No suggestion necessary, 63

Application to be made on affidavit, 63

No writ to issue, 63

Order for may be discharged, varied or set aside by D. C. subject to appeal, 63

Appeal-

To Court of Appeal and Supreme Court, 63

Notice of, must be given to Judge, 63

Stay of proceedings-

Order cannot be made by High Court, 63

If execution levied or money made, re-payment may be ordered, 63 Judgment on transcript to higher court will be set aside, 63

Declaration in prohibition-

Court may direct, 63

Where proceedings resorted to, 63

Practice in such cases repealed, 63

Costs-

In discretion of court or Judge, 63

How usually awarded, 63

Authorities as to, 63, 64

When question of title raised, 70

Damages-

When action for, will lie after prohibition, 64

Postponing decision-

Will be granted, if postponement without complying with statute, 208

Party complaining must be prejudiced, 208

Right may be waived by assent to delivery of julgment when ready, 208

Garnishment of Wages-

Failure by garnishee to give notice disputing jurisdiction ousts right to, 256, 257

Judgment Summons -

As to application for on defective affidavit, 323

PROMISSORY NOTE-

For gambling, debt or liquors drunk in tavern or ale-house not to be sued in D. C., 53

Action for such note not maintainable even by innocent holder, 68 Instrument defective as, may be sufficient acknowledgment, 78

Must be filed on entry of claim for writ, 127

When lost, security must be tendered before action, 128

PROTECTION OF OFFICERS (see Officers of Court), 378

PROVISIONAL JUDICIAL DISTRICTS—
Alterations in divisions of courts in, 10

PUBLIC OFFICERS-

Exercise of judgment by, 16
Act respecting security of, 26
Security may be in guarantee company, 26
Liability of sureties on covenant, 26-31
Provisions of Act respecting, to apply to Division Court officers, 34
Protection of (see Officers of Courts), 378

PURCHASER-

Replevin of goods from, 82 May replevy goods from vendor, 82 At public sale obtains no better title than vendor's, 83 At bailiff's sale, title acquired by (see Execution), 296

PUTTING OFF TRIAL, (see Trial), 167-169

R.

RAILWAY COMPANY-

Where deemed to be "resident," 112
Where deemed to "carry on business," 113, 137
Where head office out of Ontario, service of process on (see Service), 137
Who deemed agent of, for service, 137

RECORD, COURTS OF-

Division Courts not to be, 3

Judgments of Division Courts to have force and effect of judgments of, 4

Judgments of, bear interest, 4

REASONABLE AND PROBABLE CAUSE—

What deemed to be, 351

RECEIVERS-

Appointment of—
Provision of Judicature Act as to, 88
Power of Division Courts to appoint, 90
Effect of, 94, 95

in respect to proceedings in attachment, 251 Application for, 94

Cases in which appointment may be made, 94 Order for, 95

ordered, **63** e, 63

C. subject

ith statu**te,**

ent when

tion ousts

-house **not**

t holder, 68 nent, 78 RECEIVERS-Continued.

Usually made on notice, 95

When made ex parte, 95

Rights of prior incumbrances should be reserved. 95

Status of-

Not that of assignee, 95

Right to bring action and assert claims, 95

Actions by-

In name of debtor, 95

Leave to bring, 95

Accounts of, to be passed, 95

Remuneration of, 95

When money in hands of, attachable, 248

May be appointed as to husband's interest in lands of wife dying intestate, 248

Where order made for application of part of fund to support of debtor, 248

RECOVERY OF LAND (see Actions for Recovery of Land)

Action for, not maintainable in D. C., 54

Prohibition granted to restrain action for, so far as freehold, but not as to leasehold, 58

When jurisdiction in action for, ousted, 68

When not ousted, 69

Procedure in such cases, 69

Hereditments, title to, 70

Exceptions-

Actions in which title to land does not oust jurisdiction, 70

REFERENCE TO ARBITRATION (see Arbitration), 283

RELEASE OF SURETIES (see Sureties), 29

REMOTE COURT-

Time of holding may be regulated by Lieutenant-Governor, 9

REMOTE PART OF PROVINCE-

Examination of witnesses in, 203, 204

Definition of, 203

RELIEF-

Division Courts to have full power to grant, in same manner as:
High Court, 88

High Court, 66

Provisions of High Court respecting, 88

against penalties and forfeitures, 88

" 11 1 1 1 00

injunctions and receivers, 88

equitable claims, 88

counter-claims and third parties, 89

WESTY LAW URRARY

RELIEF-Continued.

Provisions respecting equities appearing incidentally, 89
stay of proceedings if action for same cause pending
out of Ontario, 89
giving effect to legal claims, 89

stipulations not of the essence of contracts, 89

Power of Division Courts to relieve against penalties, forfeitures or agreements by way of liquidated damages, 91, 96

Not now subject to appeal, 91

Defences and counter-claims (see Counter-claim), 91, 98

Only abstract powers of High Court conferred, 91

Against third parties (see Third Parties), 98

Appointment of receivers (see Receivers), 91-95

REMOVAL OF ACTION-

By certiorari (see Certiorari), 233, 234

RENT-

Rent of court room-

How paid, 7

Actions for-

Jurisdiction of D. C. in, 61

Where jurisdiction ousted in, 69

Claims for-

May be subject of interpleader, though title in question, 70

Stranger whose goods distrained on tenant's premises cannot question landlord's title, 81

Replevin of goods distrained for, 81

Justification of distress by landlord, 85

When attachable by garnishee process, 247

Landlord's claim for, 355

Provisions as to such claims (see Landlord), 365-367

REPLEVIN-

Entry in procedure book "struck out for want of jurisdiction," etc., not evidence of judgment in, 37

Action of-

A personal action, 75

Jurisdiction in, 79

Value of property recoverable not to exceed \$60, 79, 80

Damages recoverable under Consolidated Rules, 79

Consolidated Rule as to bond in, 79

Whether Consolidated Rules applicable to D. C., 80

Replevin Act, provisions of, applicable, 80

Court in which action may be brought, 80

When property removed from one county to another, 85

Questions of title to land now oust jurisdiction in, 80

D.C.A. -33

wife dying

support of

ebold, but

a. 70

rnor, 9

manner as.

Replevin-Continued.

Verdict in divisible, recovery may be for part of goods, 80

Notice of action not necessary in, 80, 81

Questions of taking or detention, matters of defence at trial, 81 Right to bring, 81

Where maintainable by person with bare possession, 81, 84

Will not lie for goods seized by Collector of Customs, 81

Not maintainable by debtor in attachment, 345

But may be by third party, 345

Will be stayed on issue of interpleader summons, 345

Provision of Municipal Act as to quashing of by-law before action, not applicable, 81

Where lien on goods, it must be discharged before action, 81

Will lie for goods taken by force or fraud, 81, 83

When innocent purchaser protected in such case, 83

Demand necessary when goods in possession of third person, 81

Will lie against wrong-doer with bare possession, 81, 84,

Maintainable by agent of foreign company entitled to possession, 81

Evidence necessary when brought on facts which would sustain trover, 81

When maintainable on distress for school rates, 81

Procedure in such cases, 81

On goods seized for taxes, 81

Will not lie on distress warrant for non-payment of fine, 85

When purchaser of goods may bring, 82

Bailiff cannot sell goods and interplead for proceeds when claimed by third person, 82

Purchaser in such case may replevy, 82

Hirer of goods under terms of hire receipt may bring, 82

Maintainable in Superior Court for goods seized under attachment in D. C., 82.

When maintainable against assignee or guardian in insolvency, 82

Will lie for share of increase of farm stock, 82

Second action maintainable for same goods but not against same party, 82

Employer may bring for goods on which work done though money due thereon, 82

Will lie for growing crops, 84

What may be taken when goods wrongfully intermingled, 84

Where goods stolen or found owner may bring, 82, 83

And notwithstanding sale or transfer of goods, 82, 83

Where taking of goods not justified under warrant of arrest, 85

Taking of goods under search warrant, 85

Goods seized for distress under illegal conviction, 86

Maintainable for goods borrowed, 83

Articles carried about the person or worn, not subject of, 83

WARREST WAS TREATING A

REPLEVIN-Continued.

Of goods by vendee under bill of sale having effect of preferring oreditors, 85

Will lie for a swarm of bees, 83

for money in a box, 83

for leather made into shoes, 83

for increase of animals, 83

for a ship and sails, 83

for goods distrained off premises, 83

for vessel acquired under proceedings in rem in foreign Admiralty Court, 83

for leases or title deeds, 83

Will not lie for animals feræ naturæ and unclaimed, 83

Nor for goods seized by sheriff or bailiff under process against plaintiff in, 80

Will lie for growing timber sold and cut into logs, 83

Certiorari not applicable to, 84, 107

Liability of officer for not executing writ, 84

Where sheriff, liquidator for plaintiffs and as such institutes the action, 85

Parties, who must join in, 83

Mere servant of owner cannot bring, 83

Proceedings in-

When order required, 83

Affidavit for order, 83

When made by agent, 84

No formal pleadings necessary, 80

No other action to be combined with, 83, 84

When discontinuance may be obtained, 84

Plaintiff to recover all consequential damages in, 83

Where writ issued with blanks for defendant's name, claim of property no waiver, 86

Return to Writ-

Necessity for, 84

What is a good return, 84

Pleadings in-

Denial by bailiff of taking, effect of, 84

When brought for detention only, claim to be framed as in detinue, 84

Description of Property-

What sufficient, 84

Service and Execution of Writ, 84

Fees how ascertained, 84

Damages in-

What recoverable, 84, 86

ial, 81

84

re action,

, 81

son, 81

ession, 81 d sustain

, 85

n claimed

2 ttachment

lvency, 82

inst same

ugh money

d, 84

rest, 85

f, 83

REPLEVIN-Continued.

On claim of special property by sheriff, 86

Demand-

Evidence of, necessary, 84

Impounding Property-

Will not lie against pound keeper, 85

When property is impounded, 85

Juru in-

When party entitled to, 85, 232

Payment into Court in, 178

Of Goods Distrained-

Under landlord's claim for rent (see Landlord), 368

Effect of, 368.

REPLEVIN BOND-

Sureties required in, 86

Duty and liability of bailiff in respect of, 86, 87

When assignable, 86

Action on, power of court to stay proceedings in, 86

Court averse to staying proceedings in, 87

When maintainable, 86, 87

Subject of, 87

Set-off and payment into court, 87

Where to be entered and tried, 87

Damages recoverable in, 87, 88

Assignee may sue on, 86, 87

Though irregular, may be good as volunterly bend, 87

How enforceable in such cases, 87

Release of sureties in, 87

what deemed to be, 87

Liability of sureties, 87

in ordinary cases, 87

in distress for rent, 88

Liability of landlord for act of bailiff, 88

RESIDENCE --

What deemed to be, 31, 111

Where defendant resides, 111

Cases in illustration, 111, 112

Where company "domiciled or ordinarily resident," 112

Applied to companies for manufacture and sale of goods, 112

building contractors, 112

joint stock companies, 112

foreign corporations, 113

When acquired for purpose of giving jurisdiction, 112

See Carrying on Business

RESIDENT-

Definition of, 31
Within the county, meaning of, 31

RESISTING OFFICERS-

Assaulting bailiff or assistant in execution of duty, 372 What constitutes such assault, 372 Provisions of Criminal Code as to, 372 Procedure and penalty against offender, 372 Liability of bailiff for acts of assistant, 372

RESTORATION OF GOODS-

On payment or tender of amount of execution (see Execution), 304
In attachment, on what terms goods restored (see Absconding Debtors), 348

RETURN-

Of Process-

Neglect of bailiff as to (see Bailiff), 47

To writ of replevin, 84

When summons cannot be served (see Service), 131

Executed by bailiff of foreign division, 139

Of execution (see Execution), 308, 310

Of judgment summons (see Judgment Summons), 322

Of warrant of attachment (see Absconding Debtor), 336-340

Of Emoluments, etc-

To be made annually by officers to inspector, 53

Of business of office to be made by clerk to Lieutenant-Governor, 53

Of jury fund to county treasurer, 242

in cities forming separate divisions, 243

Of committals to be made annually by clerk to inspector, 835

RETURN DAY-

Meaning of, 129

Summons to be served at least 10 days before, 129

When defendant out of county, service to be 15 days before, 129

REVISION OF STATUTES-

Effect of, on existing rules and order, 390

REVISION OF TAXATION (see Costs)

Judge to revise, 38

Proceedings on, 38

REVOCATION OF AWARD (see Arbitration), 285

REVIVING JUDGMENTS-

Not necessary if execution issued within 6 years, 5

REVIVING JUDGMENTS-Continued.

Effect of, 5

When application for, necessary, 5 When and how application to be made, 5

In case of death of party, 308

REVIVING PROCEEDINGS-

Action may be revived against executor de son tert, 308

RIGHT TO BE HEARD-

Every one entitled to, 36, 265

Riot-

Bailiff may arrest for, within hearing of court, 43 Offence defined, 44

RULES AND ORDERS-

(See Board of County Judges), 389-392

RULES OF HIGH COURT-

Applicable to Division Courts, 88-91

As to non-suit, not applicable, 91

As to service of parties, not applicable, 91

As to speedy judgments acted upon in Division Courts, 92

As to discovery, not applicable, 92

Applicable to commissions issued out of Division Courts, 204

See Practice, 393

S.

SALARY-

When garnishable (see Garnishment), 253-258

SALE OF GOODS-

Under Execution (see Execution), 317

Procedure prior and subsequent to, 317-320

Notice of, 317, 318

Not to take place for 8 days after seizure, 318

Officers not to purchase at, 320

May be made after, if seizure before expiry of execution, 295

In attachment (see Absconding Debtor), 345

SAILOR-

Rights respecting wages (see Master and Servant), 101

SCHOOL BATES-

Replevin of goods seized for (see Replevin), 81

When distress for, justified, 81

SEAL-

Each court to have, 2
Process to be sealed or stamped, 2
To be paid for out of Consolidated Revenue Fund, 2
Requisites of, 2, 3
Absence of, effect of, 3
Application for, to be made to inspector, 3

SEARCH WARRANT-

Replevin of goods taken under (see Replevin), 85

SECURITY-

Of Division Court Officers-Clerks and bailiffs to give, 26 Means sufficient security, 26 Nature of, and liability of sureties thereon (see Sureties), 26-31 Judge to fix amount of, 26 How same should be regulated, 26 Should be free from objections, 31 To be filed with clerk of the peace, 31 May be sued in any court of competent jurisdiction, 32 To be available to suitors, 32 To be renewed on death, withdrawal, etc., of surety, 33 Procedure when surety discontinues, 33 Provisions of Act respecting public officers to apply, 34 Sections of that Act made applicable, 34, 35 Powers given by, to be exercised by Judge, 34 Liability of former sureties for acts previous to renewal, 35 Forfeiture or penalty on failure to give, may be remitted by the the Judge, 34 Time for giving, may be extended for two months, 35

the Judge, 34
Time for giving, may be extended for two months, 35
May be approved, if given after time limited, 35
Acts of officers not void by delay in giving, 35
Executed by sureties at different times, when to be registered, 35
Surety not discharged or bond vacated by irregularity in, 35
May be filed after time expired, 35
Property of office not to be delivered until after bond executed, 40
Duties of inspector as to, 50
Information to be given to inspector as to, 52
Certificate of filing to be produced to inspector, 52
In replevin (see Replevin Bond), 86
In garnishee proceedings (see Garnishment), 277, 278

In Attachment (see Absconding Debtor), 348, 349, 353

On release of goods seized, 348, 349 On sale of perishable goods, 353

In Appeal (see Appeal), 222

04

95

SECURITY-Continued.

How given, 223, 224, 227 Approval of, 224, 226 Sureties in, 224, 225 Who may be, 225 Objections to, 226 Justification of, 225 May be waived, 224

SECURITIES FOR MONEY (see Execution)-

Liable to seizure under execution, 314, 315 Circumstances under which money seizable, 315 Procedure on seizure of, 315, 316, 317

SEIZURE (see Execution)-

Formalities of, 294
Goods liable to, 294
Moneys and securities, 314, 315
Mortgagor's interest in goods, 314
Of goods under warrant of attachment, 340

SEDUCTION-

Action for, not maintainable in D. C., 54, 72

SENIOR COUNTY-

On separation from junior, divisions to continue, 12 Papers to be delivered by officers as Judge directs, 14 Proceedings to be continued in certain cases, 14

SEQUESTRATION-

Division Courts have power to order, 90 Where remedy applicable, 95 Effect of, 95

SEPARATION OF JUNIOR FROM SENIOR COUNTY (see Senior County), 12, 14

SERVICE-

Bailiff to serve all process, 41
not bound to make out of his division, 41
Mileage on, not payable out of his county, 41
If insufficient as to time prohibition will lie, 58
Of writ of replevin (see Replevin), 84
Of summons, when suit brought in court nearest defendant's residence, 114
Of order changing place of trial, 117, 120
Of summons forwarded from other division, 126
Of summons, when to be 10 days and when 15 days before return,

Meaning of "return day," 129

SERVICE-Continued.

Personal, when claim exceeds \$15: 130

How made when claim does not exceed \$15: 180, 182

Due proof of, what is, 150

Of subpœna (see Subpœna), 189, 192

Of notice of motion for speedy judgment, 155

Of notice of executing commission to take evidence, 197

Of attaching order after judgment (see Garnishment), 260

Effect of, 260-262

On garnishee, of summons after judgment, 265

Rights of persons as to, or proceeding affecting their interests, 265

On garnishee, of summons before judgment, 268

Where garnishee a foreign corporation, 268

Of judgment summons, 822

Of process in attachment against absconding debtor, 350, 351

Personal Service-

Meaning of, 130

What held to be, 130, 131

Original to be shewn if required, 130

What held not to be, 131

On county corporations, 131

On other corporations, 131, 132

On foreign corporations, 132

On Sunday void, and cannot be waived, 131, 132

After amendment of particulars must be re-served, 131

Procedure when party refuses to take copy, 131

Judgment in default of appearance on personal service, 166, 167

Irregularities in-

Effect of, 131, 132

Waived if not promptly moved against, 131

When judgment set aside for, 131

Duty of bailiff on failure to effect, 131

When and by whom to be made, 131, 132

May be in any county by any bailiff, 131

May be while defendant attending court, 132

Effect of on wrong person, 132

Admission of, waives all irregularities, 132

And also appearance at trial, 132

Mode of, where not required to be personal, 132

Duty of bailiff in such cases, 132

Not necessary to be by bailiff, 132

Effect of when personal in action on foreign judgment, 132

Whether good or not, a question for Judge, 132

Substitutional-

When order for, will be granted (see Substitutional Service), 133-136

2, 14

's resi-

return,

SERVICE-Continued.

Facts not sufficient to shew, may be ground for substitutional service, 134

On official of gaol in which defendant confined, not sufficient, 134

On person out of jurisdiction, of no effect, 184

Unless he has an office and an agent in Ontario, 134, 135

On a lunatic, 135

Necessity for guardian ad litem in such case, 135

Wilfully evading, what is, 136

On Foreign Corporation Firm or Individual-

May be on agent whose office within division or nearest thereto, 136

Corporations to which provision applicable, 137

Of process where there is no bailiff, 138

When required to be served out of division, 138

Affidavits of-

To be prepared by clerk, 189

To be annexed to or indorsed on summons, 139

To state distance travelled, 140

How mileage computed, 140

Other requisites of, 151

May be received notwithstanding defects, 151

On one of several partners or joint debtors-

May be made in certain cases (see Partners), 140

On partners in action against firm (see Partners), 142-145

Of proceedings in Appeal-

Parties to appoint agent for, 227

Of Summons to Jurors (see Jurors), 237

SET OFF-

As to crediting of, in order to give jurisdiction (see Jurisdiction), 59, 75, 106

May be pleaded in action on replevin bond, 87

Reduction of claim for over \$100, not sufficient to give jurisdiction (see Unsettled Account), 106

Available in action against one of several joint-debtors, 140

What it signifies, 179

Powers of Division Courts in respect of, 179

Distinguished from counter-claim, 96, 179

Effect of distinction on question of costs, 180

Notice of-

To be given 6 days before trial, 179

To be sufficient notice of defence, 158

Particulars of-

To be given with notice, 180

Requisites of, 180

Service of, 180

SET OFF-Continued.

No evidence to be given as to matters not contained in, 187 Amendment of, 187

Notice by Clerk-

To be given stating the sittings, etc., 180

Statutes of Limitation-

Not a bar unless 6 years elapsed before action, 182

Evidence-

Not to be given except as to matters contained in particulars, 187

Excess over plaintiff's claim-

Defendant may have judgment for, if within jurisdiction, 187

When amount beyond jurisdiction, 188

Adjudication in such case to be no bar to recovery of excess, 188

Where matter beyond jurisdiction involved (see Defence), 99

Costs-

Defendant only entitled to costs of defence, 188

Cross-judgments-

May be set-off (see Execution), 303

SETTING ASIDE PROCEEDINGS-

In certiorari (see Certiorari), 107, 108

For irregularity in service (see Service), 131

Order for substitutional service (see Substitutional Service), 135,

136 Judgment by default (see Judgment by Default), 145-150

Subpœna duces tecum (see Subpœna), 192

Irregular judgment (see Judgment), 212

Attachment of debts (see Garnishment), 277

Process of court not to be set aside for matters of form, 292

Award of arbitrators (see Arbitration), 287

Judge has inherent power to set aside proceedings improperly issued, 339

Execution (see Execution), 301

Attachment of goods (see Absconding Debtor), 339, 352

Powers of High Court as to, not applicable to D. C's., 394

SETTING OFF JUDGMENTS-

Cross-judgments may be set off, 303

Effect of, 303

SETTLEMENT-

Action on, not maintainable in D. C., 54

SHALL (see Discretion)-

Meaning of, 5, 15, 16

SHERIFF-

To be one of tribunal for altering divisions of courts, 11

titutional

cient, 184

reto, 136

isdiction),

risdiction

140

SHERIFF-Continued.

Execution of writ of replevin by, where instituted by him as liquidator of plaintiff, 85

Return by, to writ of replevin, 84

May put in claim of special property in replevin of goods by grantee of judgment debtor under bill of sale, 86

Right of, to intervene and take goods seized by bailiff of D. C. (see Execution), 302, 319

How proceeds of goods to be distributed by, 302

Bailiff's fees in such cases to be paid by, 302, 319

Procedure by, on failure to make money on Division Court judgments or certificates filed, 302

Proceedings by, for attachment of debts due to execution debtor under Creditors' Relief Act, 280

Right of, to recover money attached in Division Court, 279, 280, 281 Entitled to all money in Division Court under attachment against primary debtor, 279-281

When Division Court attachment superseded by (see Absconding Debtor), 340-342

SIGNATURE-

Of Judge not necessary to be by his own hand, 18 What is a, 77
Sufficiency of, on ascertainment of amount, 75-78
Of deponent to affidavit, 119
Of commissioner or clerk to jurat, 119

SITTINGS OF COURTS-

Time and place of holding, 5, 6
Accommodation for, 6
Number of, in Toronto, 6
Number requisite in cities and towns, 6
Where to be held in cities where two courts established, 6
Municipality to furnish accommodation for, 7
When no proper court room furnished, 7
Payment for accommodation, how made, 7
Not to be held in connection with hotel, 7
In county town to be held in court house, 9
In remote districts, how regulated, 9
Clerk of the peace to keep a record of, 16
Where held when general sessions at same time, 19
Who to preside at (see Judge), 19

in case of illness or absence of judge, 19

SLANDER-

Action for, not maintainable in D. C., 54 Defined, 72 Cases held to be, 72

SOLICITOR-

im as liqui-

f goods by

of D. C. (see

Court judg.

tion debtor

79, 280, 281 ent against

Absconding

Judge not to practice as, 19
Clerk not to practice as, 22
What held to be practising as, 22
May appear for parties at trial, 164, 170
Judge may be compelled to hear, 170
Power of Judge to exclude, 170, 171

Costs of-

In action for, defence of no signed bill, statutory defence, 187

Lien for-

Priority over garnishee proceedings, 252

Does not prevent attachment by creditors of judgment debtor, 252

Notice of, must be given, 252

effect of, 252

Set off not allowed to prejudice of, 303

SPEEDY JUDGMENT-

Rules of High Court not applicable to, 92, 154 Claim must be over \$40, 154, 161 Summons and particulars, requisites of, 161

Motion for-

When and to whom made, 153, 155, 158, 161 To what cases applicable, 154 Right to, dependent on jurisdiction, 154 Affidavit for, 153, 155

requisites of, 155 defective, effect of, 157 copy of, to accompany notice, 155

Notice of, 156

requisites of, 157, 158
service of, 158, 156, 158
when returnable, 153, 158
waiver of, 157
who to give, 157
and affidavit to be filed, 158
ratification of, when given without authority, 157

Setting up Defence-

By affidavit or otherwise, 158 What affidavit to shew, 158, 159 Bringing Money into Court, 153, 160

Defence on, not to be allowed without affidavit of merits, 160

Who entitled to money paid in, 160

Defence as to Part, 153, 154

Judgment for part undisputed, not as to recovery of remainder, 158, 160

If part admitted judgment may be therefor, 154, 161

SPEEDY JUDGMENT-Continued.

Part admitted, cannot be ordered to be paid, 154, 161

Examination of Defendant-

May be ordered by Judge, 153, 160

When plaintiff entitled to order, 160

Effect of disobedience thereto, 160

Production of documents, may be ordered, 160

Costs of, 160

Execution on-

For part admitted, may be stayed until dispute decided, 161 Amendment—

Of summons after service of notice of motion, will not give jurisdiction, 161

Leave to defend-

When to be allowed, 154, 161

Terms of, 154, 161

SPLITTING DEMANDS-

Causes of action not to be divided, 102

Meaning of "dividing causes of action," 102

What is a cause of action, 102

Prohibition will be granted on, 103

Divisible demands, 102, 103, 104

Demands, not divisible, 104

Distinction between demands which are single and those which are several. 164

Consolidation of different causes depending at same time, 104

By Assignment (see Assignment of Choses in Action), 128

In Attachment (see Absconding Debtor), 345, 346

SPIRITUOUS LIQUOR-

Action for, not maintainable in D. C., 53

Nor for promissory note given therefor, 53

When jurisdiction is and is not excluded in such actions, 66

Whether drunk in a tavern or ale-house, a question for Judge, 66

Question whether spirituous or malt, a question of fact, 67

Liquors deemed to be spirituous or malt, 67

Legal items separable from illegal, and recoverable, 67

Appropriation of payments on such account, 67

Cross-demands may be settled by, 67

Right to pay for not prohibited, 67

Meaning of "drunk" or "consumed on the premiser," 68

SQUARES-

Definition of, 44

STAKEHOLDER-

Liability of, for money in his hands (see Gambling Debt), 68

STATUTES OF LIMITATIONS-

Judgment not enforceable after 20 years, 4, 181
Effect of revivor within 6 years, 4, 5
Foreign judgment barred in 6 years, 5, 181
Limitation of action against officers and sureties, 30, 383
Where question of application of would arise, certiorari granted, 107
Notice of defence of, to be given, 179
how and when to be given, 179

· When statute begins to run, 180

Fraudulent concealment does not prevent, 180

Except in actions over which Court of Chancery had concurrent jurisdiction, 180

In actions accruing after death, 180
for fraudulent misrepresentation, 180
of account or for not accounting, 180
for mercantile accounts, 180
for rent on indenture of demise, 180
on a bond or recognizance, 180
on award in writing under seal, 181
for an escape, 181
for money levied on execution, 181

for a penalty or statutory damages, 181 for the recovery of land or rent, 181 rent, including annuities and sums charged on lands, 181 for a solicitor's bill, 181 against mortgagor in possession, 181

against mortgagor in possession, 181 on covenant to indemnify, 181 judgment of foreign country, 4, 181 claims of executor against testator, 181 for malicious prosecution, 181 for calls for shares, 181 for conversion, 181

on a covenant in mortgage, 181 on judgment of court of record, 181 on a demand note, 182 on a bill of exchange, 182 on settlement of partnership accounts, 182 against solicitor for negligence, 182 when damages gist of action, 182

for wages earned by minor, 181 When action stops, 180 Plea of, and of set-off, good defence on the merits, 180 Interest recoverable for whole period, 180 When superseded by special statutory limitation, 182

Procedure to keep claim alive, 182

d, 161

give juris-

e which are

ne, 104

ns, 66 Judge, 66 t, 67

' 68

bt), 66

STATUTES OF LIMITATIONS-Continued.

Personal representatives, before administration, may bring action so as to bar, 182

Sufficient Acknowledgment to Bar-

Must be before action, 185

Must be in writing, 183

Must import distinct and unqualified acknowledgment, 184

Must be certain and unconditional, 182, 184

Legal effect of, 182, 183

Cases held to be sufficient, 182, 183

When by doubtful or ambiguous language, how question determined, 185

Acknowledgments held not to be sufficient, 184, 185

Invalid acknowledgments,—physical or mental weakness, 185

judgment on voluntary settlement, 185

Acknowledgment, to whom to be made, 185

When acknowledgment by part payment sufficient, 185, 186, 187

Trustees-

When statute applicable to executors, administrators and trustees, 187

STATUTORY DEFENCE-

Notice of, must be given, 179

Defence in action on bill of costs if no signed bill, 187

Notice of to be deemed notice of defence, 158, 178

STAYING PROCEEDINGS-

On application for prohibition, 63

In replevin, 86, 87

When action for same cause pending out of Ontario, 89

On plea of tender and payment into court, 175

Order for stay until further order of court cannot be abandoned, 175

Of execution on ground of inability of defendant to pay, 215

On appeal, 222, 223

On issue of transcript to Division Court, 306

In action of replevin, on issue of interpleader summons, 345

STOLEN GOODS-

Replevin of (see Replevin), 83, 85

STREETS-

Meaning of, 44

STRIKING OUT COUNT-

Judge has power to strike out count ousting jurisdiction, 58

SUBPŒNA-

Judge compelled to attend on duces tecum, 19

ng action

84

ion deter-

s, 185 ment, 185

186, 187

trustees,

doned, 175

, 215

345

SUBPŒNA-Continued.

Parties may obtain from clerk, of any D. C., 188

Necessity for, 188

Applicable to any resident of the province, 188

Cannot be issued in blank, 189

Must name place of trial, 189

May contain any number of names, 192

Witness resident in foreign country may be served here, 189

Conduct money in such cases, 189

How to be served, 189, 193

To be served reasonable time before trial, 189

May be served by any literate person, 192

Proof of service, 192, 193

Duces tecum (see Witness), 191

When issuable, 188

Production of documents under, 191, 192

Penalty for disobedience to, or for refusal to be sworn, 193

Setting Aside-

Duces tecum for production of irrelevent documents, 192

Service of, out of county, 194

Witness fees in such cases, 194, 195

As to witness fees (see Witness), 189-192

Contempt-

When witness guilty of, 189, 193

Penalty of disobeying or refusing to be sworn, 193

SUBSTITUTING PARTIES-

Witness admitting that he is real debtor, may be substituted for defendant, 55

SUBSTITUTIONAL SERVICE-

May be ordered upon defendant, primary debtor or garnishee, 133

Affidavit for-

Requisites of, 133, 134

Application for-

To whom made, 135

Wnat must be shewn on, 133, 134

Order for-

Grounds for granting, 133, 134

When it may and may not be granted, 183, 184, 185

For service on persons out of jurisdiction, 134, 135

Principle of, 135

When defendant has absconded, 133, 135

When out of Ontario, but has an office and agent within province,

When summons deemed to have come to knowledge of party, 134, 135

D.C.A. -34

SUBSTITUTIONAL SERVICE-Continued.

Usually made ex parte, 135

Irregularities in, may be waived, 135

What should be prescribed by, 186

Application to Set Aside Order-

Time and manner of making, 135

Affidavit for, requisites of, 136

May be set aside for good cause if properly made, 136

Terms of, 136

Proceedings after Order, 136

Must conform to order, 186

Wilfully Evading Service-

Meaning of, 136

Absconded-

Meaning of, 136

Of attaching order (see Garnishment), 260

SUFFICIENT CAUSE-

What is, 215

SUITOR'S MONEY-

Clerk to keep account of, 38

Verified account of, to be furnished to Judge when required, 39

List of, to be made out by clerk annually and put up in his office

and in court room, 89

Collected by bailiff on process issued out of division, 139

Clerk to mail notice of, payment of, 387

How notice to be sent, 387, 388

Form of notice, 388

See unclaimed money, 388, 389

SUITS-

Where to be entered and tried (see Territorial Jurisdiction), 109-124 By and against clerks and bailiffs (see Clerks and Bailiffs), 123, 124 By and against Judges, etc. (see Judge), 125

SUMMONS-

Clerk to issue, 36

To be filled up without blanks, 36

Is commencement of action, 36

Effect of neglect to issue and serve, 36

May be waived by defendant's appearance, 36

Not to issue when want of jurisdiction apparent, 86

Nor if sought for improper purpose, 36

To be a perfect process when delivered for service, 37

Clerk to keep record of, 37

Bailiff to serve, 41

Summons—Continued.

By inspector on inquiry by him, 51 In replevin, issued in blank for defendant's name, 86 How to be numbered, 127

Indorsements on-

Of notice respecting change of place of trial, 129 In what cases notice material, 130 Time for making cannot be enlarged, 130

Service of-

When suit brought in court nearest defendants' residence, 114 When forwarded from another division, 126 To be served 10 days before return, 129 When defendant out of county, to be served 15 days before return, 129

When to be personal or otherwise, 130 When there is no bailiff, 138

When required to be served at a distance, 188

In Attachment-

When proceedings commenced by, 345 Service of, 850

Affidavits of Service-

To be prepared by clerk, 139 Requisites of, 139, 140 Mileage to be stated in, 139

Special-

Judgment by default on (see Judgment by Default), 145-149

Alias-

When requisite, 150 To jurors (see Jurors), 235-237

On garnishment of wages, 257 memorandum to be endorsed, 257, 258

To garnishee after judgment, 263 requisites of, 263 from what court to issue, 263, 264 when returnable, 263, 264

mode of service, 265

To garnishee before judgment, 267 from what court to issue, 267, 268 memorandum on, 267 service of, 268, 269 effect of, 273, 274

In case of conflicting claims, 278, 282

SUPPORT AND MAINTENANCE --

Of debtor's family, what necessary for, 255

quired, 39 p in his office

139

tion), 109-124 liffs), 123, 124

SUBETIES -

Responsibility of for deputy-clerks and bailiffs, 24, 25, 27
Liability of clerks' and bailiffs', 26-81
Guarantee company may be, 25
Covenant of, enures to suitors, 27, 32
Joint suretyship of other surety part of consideration, 27
Meaning of "sureties," 27
Who may be, 27, 30, 31
Liability generally on official bond, 27
The scope of the covenant, 27
Not liable where no legal appointment, 27
To what default liability attaches, 27

in paying over money, 27, 28 non-performance of duties, 28 misconduct, 29

Demand, when necessary, 29 Parties to action against, 29 Release of, 29

Several actions—limitation of liability, 30 when proceedings will be stayed, 30 relief in such cases, 30

Contribution, 30, 140, 141
what is, 141
extent to which judgment enforceable against others,
30, 141

Death of, 30

new security to be given, 30
liability of other sureties in the meantime, 30
Rights of sureties against officer, 30
Statute of limitations, when action barred, 30
Must be freeholders, 30
Residents of county, 31
Liability if not residents, 31
Amount of covenant, how regulated, 31
Judge to approve covenant, 26, 31
Covenant to be verified by affidavits of execution and justification, 31
Should be free from all possible objections, 31

To be filed with clerk of the peace, 31

Not discharged by officers' omission to execute, 32

Where covenant may be sued, 32

Certified copy of covenant to be evidence, 32

Entries by officer to be evidence against, 32

Covenant applicable to person who has ceased to be an officer, 32

Proceedings on death, withdrawal or insolvency of, 33

Forfeiture of office on failure to comply with statute, 33, 34

Sureties-Continued.

Procedure on discontinuance of, 33, 34

Act respecting public officers applicable, 34 Powers conferred by such Act to be exercised by Judge, 34

Provisions of that Act set forth, 84, 35

Liability of, on withdrawal for matters previous to renewal of covenant, 35

Duty of inspector as to, 50

Officers to inform inspector of names, etc., of, 52

and of new sureties, 53

Liability of, in respect to process served or executed at a distance,

When co-surety may compel an assignment of judgment, 141

In Replevin (see Replevin Bond), 86

Release of, 87

Liability of, 87, 88

In Appeal (see Appeal), 224-227

Justification of, 224, 225

Who may be, 225

Objections to, 226

Suspension of Officers (see Clerks and Bailiffs), 22, 23

T.

TABLE OF FEES-

To be hung up in clerk's office, 44

TARIFF-

Of fees to be hung up in clerk's office, 44 Officers not to take fees except as provided by, 47 And statute prescribe all lawful fees, 50

TAVERNS AND ALEHOUSES-

Action for liquors drunk in, prohibited, 58
Meaning of, defined, 67
Character of, not destroyed by additions to, 67
When jurisdiction ousted (see Spirituous Liquors), 67
Meaning of "drunk or consumed" on the premises, 68

TAXATION OF COSTS-

Is a "proceeding," 12 Procedure on (see Costs), 38, 45 Revision of, 38

TAXES-

Replevin of goods distrained for, 81

st others,

justifica-

fficer, 32

34

TELEGRAMS-

Proper person to produce on subpœna, 190

TELEGRAPH COMPANY-

Foreign corporations, having office and agent in Ontario, service of process on, 137

TENANT-(See Landlord)

Where estopped from denying landlord's title, jurisdiction not ousted, 69

TENDER-

Plea of-

When to be filed, 171

Payment into court to accompany, 171

To what actions applicable, 171

Operation and effect of, 171

Admissions by, 171

Stay of proceedings, 175

When interest stopped by, 174

Plaintiff may be non-suited after, 175

By whom made-

By servant or agent, 171

To whom made-

Persons authorized to receive payment, 171, 172

Where there are several demands, 172

To an executor, 172, 173

Waiver of, 172, 173

Set-off not applicable in reduction of amount due, 172

Mode of making, 172

In silver and copper, 172

Bank notes, 172

By cheque, 172

Evidence of, 172, 173

Production of money, 172

When dispensed with, 172

Cases thereon, 172, 173

Requiring change, 173

Where plea may or may not be supported by tender of larger sum, 172, 173

Demand of receipt, 174

Not good if accompanied by demand of receipt in full, 174

But condition may be waived by creditor, 174

Receipt for amount tendered may be demanded, 174

Whether absolute or conditional a question of fact, 174

Under protest, may be made, 174

TENDER-Continued.

Demand of payment-

By creditor prior or subsequent to, effect of, 174

What deemed to be sufficient, 174

Onus of proving, 174

Refusal of, 175

Not ground for action, 175

Notice of defence of, 175

To be given by clerk to plaintiff, 175

Disposal of moneys paid in under-

To be paid to plaintiff, less \$1, unless notice of intention to proceed given, 175

Suit to be determined before payment out, 175

Notice of intention to proceed-

To be given in writing within three days, 175

Effect of failure to give, 175

If given, case to be tried at next sittings, 175

Stay of proceedings -

To take effect if notice to proceed not given, 175

Effect of, 175

Practice as to, 175

Costs-

Rule as to, 176

What included in, 176

Effect of decision on question of, 176

Of amount of execution before sale, (see Execution), 304

TENDER OF AMENDS-(See Officers of Court), 386

TERRITORIAL DISTRICTS-

Holding of courts in, 21

Division Court Act, 1880, held not to apply to, 55

TERRITORIAL JURISDICTION --

When objections to, must be raised, 56

In replevin (see Replevin), 80

Court in which actions may be entered and tried, 109

Where cause of action arose, 109-111

Where defendant resides, 111-113

Where defendant carries on business, 113, 114

Court nearest to defendant's residence, 114

Service of summons in such cases, 114

Enforcing execution thereon, 114

In actions on insurance premium notes, 115

In actions by building societies for calls, 115

When suits may be brought in other than regular divisions, 115

Division adjacent to that in which defendant resides, 115

Judge's order necessary in such case, 115

er sum.

service

on not

TERRITORIAL JURISDICTION-Continued.

In actions against corporations, firms or individuals (see Corporation), 116, 136-138

Where claim exceeds \$100, and payable out of Ontario, 116

Where claim exceeds \$100 and payable at a particular place, 116

Place of trial may be changed in such cases, 116-120

Where action brought in wrong division, 120

Transfer of proceedings in such cases, 120

Proper division in which to sue, 121

When application for transfer to be made, 121, 122

Who may make application, 122

Effect of transfer, 120

Costs to be certified to court to which transfer made, 121-123

Affidavit of want of jurisdiction, 122

Procedure after transfer, 121, 122

Suits by and against clerks or bailiffs, where to be brought, 123 124

Suits by or against Judge, etc., where to be brought, 125

Trial by consent may be in any division, 135

In garnishee proceedings after judgment, where summons to issue, 263, 264

Where garnishee out of jurisdiction, 268

THIRD PARTY-

Served with process and appearing at trial not entitled to prohibition, 57

Relief against, 98

Consolidated rules respecting, not applicable to Division Courts, 98

Conditions to be complied with, 98

subject matter to which relief relates, 98 persons against whom relief sought, 98

No objection that third party could not have been joined in action, 98

May appeal (see Appeal), 217

TIMBER-

Sold and cut into logs may be replevied, 83

TIME, COMPUTATION OF-

Month, meaning of, 21

Within one month, 33

Within so many days, 52, 118, 148, 175, 212, 256, 308

Within six months, 384

Not less than two clear days, 158

Not less than six days, 178

Clear days, 212

Not more than 50 days, 215

TIME, COMPUTATION OF-Continued.

For six days, 239

One month at least, 386

TIME AND PLACE OF HOLDING COURTS-

May be regulated by Lieutenant-Governor in certain cases, 9 See Courts

TITLE OF ACT, 1

orpora.

, 116

ht, 123

issue,

rohibi-

irts, 98 "

action,

TITLE DEEDS-

Replevin may be brought for, 83

TITLE TO LAND (see Actions for Recovery of Land)

Questions of, not to be tried in Division Courts, 54

When in question, amendment to give jurisdiction not allowed, 59

When involved, prohibition granted, 62

When jurisdiction ousted by, 68

When jurisdiction not ousted by, 69

Procedure in such cases, 69

Exceptions, 70

Jurisdiction in replevin ousted by, 80

Toll-

Questions of title to, not to be tried in Division Courts, 54

Definition of, 70

What requisite to oust jurisdiction, 70, 71

Charges of a railway company not included in, 70

Harbour rates are, 70

Payments for use of locomotive power, as distinguished from use

of railway are not, 70

Right to take must be clear, 70

Mere claim of, not bona fide, does not oust jurisdiction, 71

TORONTO-

Number of courts and sittings in, 6

TORT-

Actions of, within competency of Division Courts (see Jurisdiction),

73, 75

What are, 75

Town (see County Town)-

Number of courts in each, 2

More than 6 sittings each year usually required in, 6

Township-

Definition of, 12

Establishment of courts in, 11

How same numbered, 12

TRANSCRIPT OF JUDGMENT-

To Division Courts-

Against clerks and bailiffs may be enforced in adjoining division, 124

To be prepared and transmitted on application of judgment creditor, 305

Clerk not to prepare and send without authority, 305, 306

Requisites of, 305, 306

Clerk receiving, to enter, 306

Effect of, after transmission, 306

Proceedings thereon, 307, 308

No further proceedings in home court without Judge's order or affidavit, 306, 307

Requisites of such affidavit, 306, 307

Where home court without jurisdiction, effect of, 306

Prohibition in such cases, 306

Bailiff of foreign court not accountable to Judge of home court, 306

Notice of return of nulla bona to execution on, to be given by clerk, 307

Effect of absence of registration certificate of such notice, 307, 308 Return of nulla bona in home court not requisite before issuing, 308

To County Court-

May issue on unsatisfied judgment of \$40, 310

Execution to be returned nulla bona, 310

Such return not necessary from home court when transcript to another division, 308, 310

Requisites of, 310, 311, 312

Return of nulla bona, what is, 310

What included in "sum remaining unpaid," 311

Fraudulent conveyance not impeachable by creditor for less than \$40: 311

Irregularities in, effect of, 312

Power of county court to set aside for want of jurisdiction in Division Court, 312

Effect of pendency of judgment summons proceedings in Division Court, 312

On filing to become judgment of County Court, 312

Formalities requisite on filing, 312

Where to be filed, 312, 313

Judgment in County Court void if no valid judgment in Division Court, 313

Effect of prohibition to County Court, 313

Proceedings subsequent to filing, 312, 313

TRANSFER OF PROCEEDINGS-

On separation of county, 14

TRANSFER OF PROCEEDINGS-Continued.

Where suit brought in wrong court (see Territorial Jurisdiction), 120-123

By certiorari (see Certiorari), 104, 107

To High Court where defence involves matter beyond jurisdiction, 99

See Changing Place of Trial, 118

TRESPASS--

Judge not liable in, for erroneous judgment, 17, 18
To goods, action of, within jurisdiction of Division Court, 60
Claims in, not to exceed \$60, 73, 75
Where action for, maintainable, so also is replevin, 81
Officer acting under defective process not to be liable for (see
Officers of Court), 382

Ab initio, what is, 382

TRESPASS ON THE CASE-

What wrongs subject to action of, 75 Jurisdiction of Division Courts in, 73, 75

TRIAL -

Place of (see Territorial Jurisdiction), 109-120 change of (see Change of Place of Trial), 116-119

By Judge-

Defendant to appear at, 162
To proceed in summary manner, 163
Striking out cause not usual on, 163
Judge to try cause and give judgment, 163
should hear the whole case, 163
when judgment may be reversed, 163
not to try cause in plaintiff's absence, 164
should try cause alone, 240, 241

In actions against absconding debtors (see Absconding Debtor), 346, 350

By Jury (see Jury), 232

Judge may non-suit if no evidence to submit, 163, 240 When judgment will be reviewed, 163 When jury may be required (see Jury), 282 Party cannot be deprived of right to, 282, 234 Case not to be withdrawn from, 232, 240 Order of trial (see Jury), 289, 240 Empannelling jury, 240 Verdict to be unanimous, 240

Non-suit-

Plaintiff may insist on, 163, 164 May be ordered against plaintiff's will, 164

rder or

ivision.

dgment

urt, 306 iven by 307, 308

ing, 308

cript to

ess than

tion in

Division

Division

TRIAL-Continued.

Effect of defendant examining witnesses after moving for, 164

May be after payment into court, 164

To be taken before verdict recorded, 164

Effect of, 164

Not to be granted on motion for new trial on grounds not taken at trial, 164

Procedure at. 164, 165

Order in which actions to be tried, 146

Cases transferred from other divisions, 121, 122

Jury cases to be tried in same order as other actions, 233, 234

But jury list to be disposed of before Judges' list, 239, 240,

Cases over \$100 to be at foot of list, 164

Evidence in appealable cases to be taken in writing, 164, 165

Postponement of, 167

When order for, to be made, 167

Practice as to, 167, 168

Costs on, 168, 169

Other terms, 169

In jury cases, 169

Effect of, taking benefit of terms, 169

Order for, may be re-opened before acted on, 169

Consent to, not to be withdrawn, 169

Who may appear at, 170

Mandamus will lie to compel Judge to hear agent, 170

Judge may exclude anyone, 170

Party may appear in his own behalf and as witness in the cause, 170

Procedure where defendants appear by different counsel, 170

Advocate may appear as such and as witness, 170

Authority of agent or solicitor to bind client, 170

TRIAL LIST-

Judge's list and jury list to be made out, 239, 240

Order in which actions to be tried (see Trial), 164, 233, 234, 289, 240

TROVER-

Action of, for a deed, whether maintainable in Division Court, 55 Action of, not exceeding \$60 maintainable, 73, 75

TRUSTEES-

Statutes of limitations applicable to, (see Statutes of Limitations),

When debts in hands of, liable to attachment (see Garnishment), 246, 247, 249, 252

U

UNCLAIMED MONEYS-

Disposal of, 388, 389

Action for to be barred if not claimed within 6 years, 389

When time begins to run, 389

Claims of persons under disability not to be prejudiced, 389

Unjust Preference-

Replevin of goods under bill of sale having effect of (see Replevin),

Confession of debt not within statute respecting, 289

UNSETTLED ACCOUNT -

Jurisdiction in Division Courts in actions for balance of, 105

Meaning of, 105

Cases held to be within the jurisdiction, 105

Plaintiff may abandon excess over \$100: 105

Effect of such abandonment, 106

Claim reduced by set-off not within jurisdiction, 106

Effect of judgment in action for, 106

Form of judgment, 106

Where proper form of judgment pointed out, 104

 \mathbf{v}

VALIDITY OF DEVISE-

Action respecting, not maintainable in Division Courts, 54 When jurisdiction ousted in such cases, 71

VENUE-

When suit brought in wrong court defendant may waive right to prohibition, 56

No amendment can be made in such case, 59

In replevin (see Replevin), 80

Where actions may be entered and tried (see Territorial Jurisdiction, 109-120

In actions on insurance premium notes, 115

In actions for calls of building societies, 115

Change of (see Changing Place of Trial), 116

In actions against clerks and bailiffs, 123, 124

In actions against Judges and stipendiary magistrates, 125

May be laid by consent in any division, 125

After removal of action by certiorari (see Certiorari), 108

64

taken

5

cause,

39, 240

urt, 55

ations),

ment),

VENUE-Continued.

In garnishee proceedings after judgment, 263, 264
In actions against officers, etc., acting under process, 381

VERDICT-

In replevin, may be divisible (see Replevin), 80
May be given by Judge instanter or postponed, 208
May order times and proportions of payment, 211
Setting aside (see Jury), 213-215
When attachable under garnishee proceedings, 248
Not to be set aside for matter of form, 292
See New Trial—Appeal

W.

WAGER-

Definition of, 65
Action for, maintainable by common law of England, 65
What is and is not illegal (see Gambling Debt), 65, 66

WAGES-

Infant may recover for, in Division Court up to \$100:99
Earned by minor belongs to himself, 100
Right of servant to recover (see Master and Servant), 100-102
When adjudication by justice of the peace repecting, bars action in D. C., 54

Or salary, when garnishable (see Garnishment), 253-258

WAIVER-

Omission by defendant to take advantage of defences open to him, 4 Issue and service of summons may be waived by defendant, 36, 181, 132

Taking step in suit before raising question of jurisdiction, effect of, 56

Defendant may waive right to prohibition, 56, 57
Of irregularity in proceedings for substitutional service, 185
Of defects in notice of motion for speedy judgment, 157
What it consists of, 198
Application for new trial does not amount to, 212
Of irregularity in proceedings before arbitrator, 284

WARDEN OF COUNTY-

To take part in proceedings on alterations of divisions, 10, 11

WARRANTS-

And writs of execution to be issued by clerk, 38

WARRANTS-Continued.

To be served and executed by bailiff, 41

Of distress for non-payment of fine, goods seized under, not repleviable, 85

Of commitment on judgment summons (see Judgment Summons), 330-333

Of attachment (see Absconding Debtor), 336-340

Execution of, by unauthorized person, effect of (see Absconding Debtor), 340

Of commitment of officer for misconduct, requisites of, 373, 374

Protection of officers, etc., acting under, 378

Demand of perusal of copy of, before action, 378

If clerk and bailiff joint defendants, bailiff entitled to verdict on producing, 380

What costs plaintiff entitled to in action for things done under, 386 Defendant may plead not guilty by statute, 381

See Officers of Court, 378-386

WASTE-

When injunction may be granted against, 92

WATER-

Flooding of Land by-

Action for damage by, maintainable in Division Courts though title in question, 70

Division Courts may grant injunctions restraining, 92

WEARING APPAREL-

Definition of, 300

Articles carried about the person or worn, not repleviable, 83 Exemption of, from seizure under execution, 299

WILL-

Action on devise, bequest or limitation under, not maintainable in Division Courts, 54

When jurisdiction ousted in such cases, 71

WITHDRAWAL OF JUROR-

Does not necessarily end cause, 212, 233

WITHDRAWAL OF NOTICE OF DEFENCE-

Procedure on, 162

WITHDRAWAL OF SURETY-

Procedure on (see Sureties), 38

WINDING-UP ACT-

Debt due by company in liquidation under, when garnishable, 248 Procedure necessary in such cases, 248

2 tion in

him, 4 nt, 36,

fect of,

5

1

WITNESSES-

Affidavit of disburgements to, to be furnished to clerk by successful party, 38

If fees not paid, must be disallowed, 38

Clerk not bound to pay successful party fees of, out of money deposited by plaintiff for costs, 45

Attendance of, compellable on inquiry by inspector, 51

Admitting liability, may be substituted for defendant, 55

Subpœna and service thereof on (see Subpœna), 188-190

Fees and Conduct Money, 189

To be paid or tendered to, 189-192

If not paid, not called upon to give evidence for party subposnaing him, 193

Recovery back where attendance countermanded, 189

Effect of refusal of, 189

May be examined by opposite party without payment or tender of, 189

Cannot refuse cross-examination in such case, 189

To married woman to be tendered her, and not her husband, 190

Action for, maintainable though evidence refused on ground of non-payment, 190

Solicitor not responsible for, 190

Paid by both parties, not recoverable by either, 190

Party to suit about to attend on his own account, not entitled to, 190

When party to suit entitled to, 190

What Fees Payable to, 189, 192

To witnesses resident out of county when subpœnsed, 194, 195

Tariff of, such fees, 195

To architects, etc., when summoned to give professional evidence, 192, 193

Service of subpœna does not affect right to, 195

Non-attendance of-

Effect of, 190

What is, and is not sufficient excuse for, 190

Penalty for, 193

To be liable to contempt must be material, 190

Requisites of service in such cases, 193

Where a larger sum is bona fide demanded than witness entitled to, he will not be brought into contempt. 189

Person charged with contempt has right to be heard, 194

Action Against-

May be sustained, 190

Actual damages must be shewn in, 190

Witness receiving full fees from one party and nominal fees from the other is liable to, 190 uccess-

*

money

œnaing

tender

d, 190 ound of

entitled

vidence,

, 195

titled to,

ees from

Witnesses-Continued.

Privileged Communications -

No privilege attachable to telegrams in possession of telegraph operator, 190

What deemed to be, 191, 192 What held not to be, 192

Privilege of-

From arrest, 190

Cannot while going to or returning from trial be arrested on civil process, 190

What held to be civil process, 191 Power of court to order discharge, 191

In Gaol-

Attendance of, obtainable by habeas corpus, 191

Expenses in such cases, 191
False affidavit of disbursements, effect of, 191

Examination of, 191

Procedure when witness hostile, 191

Party conducting his own cause may be, 170

Advocate may act as such and as witness, 170

Production of Books, etc., 191

Witness producing, need not be sworn, 191

May be cross-examined if sworn, 191

Not excused on ground of lien, 191

or that document not material, 191

Compellable when in possession of witness in court, 191

Not compellable by servant against master's orders, 191

All documents relevant to issue must be produced, 191

When deemed to be excusable, 191, 192

Persons in court-

May be called on to give evidence, 193

Outh of-

To be according to religion, 193

Only dispensed with by statute, 193

Of Pagan Indian admissible, 193

Affirmation may be allowed instead of, 193

Examination of on commission (see Commission), 195

Where attendance of, cannot be procured (see Evidence), 199

Examination of where resident in remote part of province (see Evidence), 203

Where aged, infirm or unable from sickness to attend (see Evidence), 203

Where resident at, distance from place of trial (see Evidence), 203

р.с.л.— 35

WITNESSES -Continued.

Material and necessary, who is, 200 Costs of, where claim disputed and defendant afterwards confesses judgment, 291

Examination on Arbitration (see Arbitration), 284

WORDS AND PHRASES, INTERPRETATION OF-

Absconder, 136, 137

Absconding debtor, 337

Adjacent division, 123

Adjoining county, 124

Agent, 136, 355

Agreement in writing, 166

All courts, 32

Any person, 170

Any party to a cause, 217

Any place named therein, 118

At all times, 50

At least 7 days, 230

Board and lodging, 254

Breach of the peace, 43

trust, 327

By virtue of his office, 28

Carries on business, 111

Carrying on business, 112, 113

Casualty, 21

Cause of action, 102, 109

Clear days, 122, 212

Concealment to avoid service, 338

Consent, 125, 126

Consumed on the premises, 68

Contempt of court, 369, 370

Contested case, 290

Coparcenary, 355

Corporal hereditaments, 70

Costs, charges and expenses, 176

Costs in the cause, 138

County, 1, 2

County town, 2

Courts of Record, 3

Custom, 71

Debt, 245, 246

Debt or money demand, 146

Debt or money payable, 118

Defendant, 176

Words and Phrases, Interpretation of -Continued.

Directly or indirectly, 48

Discretion, 5

Disturbances, 44

Dividing a cause of action, 102

Domicile, 111

Domiciled or ordinarily resident, 111

Drunk or consumed off the premises, 68

Due, 245

Due and owing, 245

Due or owing, 245

Due proof, 150

Dwells, 111

Employee, 253

Extortion, 373

Execution, 293

False pretences, 267

Family, 255

Filed, 32

For cause, 23

Forthwith (see Immediately), 23

Franchise, 71

Fraud or breach of trust, 326, 427

Freeholder, 30

From time to time, 308

Hereditaments, 70

If thought advisable, 265

Immediately, 40, 162, 371

Implements of trade, 301

Incompetency, 23

Incorporeal hereditament, 70

In detail, 123

Insolvent, 33

Insult to the judge, 251

In the opinion of the Judge, 254

In writing, 126, 166

Is empowered, 241

It shall be lawful, 241

Joint tenancy, 355

Judge, 20

Judgment, 13, 336

Judgment recovered, 264

Landlord, 355

of a tenement, 365

Levying on execution, 293

Lodger, 254

ifesses

Words and Phrases, Interpretation of-Continued.

Maintenance and support, 255

Malicious prosecution, 71

May, 152, 241

Misconduct, 373

Money received by virtue of his office, 28

Month, 21, 33

Near, 44

Nearest justice, 44

Nearest to the residence, 114

Necessary accommodation, 7

Necessary for support, 255

Negligently; neglect or refusal, neglect or ommission, 239

Notes of hand, 70

Not less than two clear days, 158

six days, 176

fifty days, 215

One month, 21, 33

On sufficient grounds, 161

Open court, 152

Other sufficient cause, 216

Otherwise, 151

Party to a cause, 217

Payment, 277

Proceeding, 13

Process, 3

Reasonable and probable cause, 351

certainty and detail, 148

efforts, 133

share, 8

Recovers, 178

Remote, 204

part of the province, 203

Resident, 31

Resides, 31, 111

Return day, 129

Riot, 44

Salary, 253

Satisfactory reasons, 119

Seal, 2

Security, 26

Senior county, 12

Servant, 338

Servano, o

Shall, 15 be lawful, 241

IN UNIVERSITY LAW LIBRAR

Words and Phrases, Interpretation of-Continued.

Shall keep, 53

if he deems it advisable, 211

Squares, 44

Substituted service, 135

Sufficient grounds, 161

reasons, 326

sureties, 31

Sum in dispute, 218

Support and maintenance, 255

Sureties, 27

Tenants in common, 355

Tenement, 365

Toll, 70

To abscond, 337

To be consumed on the premises, 68

To "neglect" doing, 239

Tolls, 301

Township, 12

Under his hand, 31, 371

Unsatisfactory, 326

answers, 326

Upon payment of costs, 169

Usual place of residence, 111

Void, 274

Wages or salary, 253

Wearing apparel, 300

Within the county, 31

one month, 21, 33

so many days, 52, 148, 175, 212, 256, 308

one week, 229

two weeks, 229

a reasonable time, 44

Wilful, 136

insult, 371

Wilfully evades service, 136

Without further proof, 32

Writing, written, 126

Wrongfully, 41

WORKMEN AND LABOURERS-

When wages of, garnishable (see Garnishment), 253-258

WRONG DIVISION-

Procedure where action entered in (see Territorial Jurisdiction), 120-122

Prohibition may be waived in such cases, 56 No amendment can be made, 59

WRONG DOERS-

Replevin maintainable against, by person having bare possession, 84

WRONGFULLY-

Meaning of, 41 Holding moneys, books, etc., of courts, 40, 41